

**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:** Proposed regulation.

**SUMMARY:** This document contains a proposed regulation under the Employee Retirement Income Security Act of 1974 (ERISA) that, upon adoption, would require 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 proposal 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 proposed conforming changes to the regulations applicable to ERISA section 404(c) plans (29 CFR 2550.404c-1). Upon adoption, these proposals will affect plan sponsors, fiduciaries, participants and beneficiaries of participant-directed individual account plans, as well as providers of services to such plans.

**DATES:** Written comments on the proposed regulation should be received by the Department of Labor on or before September 8, 2008.

**ADDRESSES:** To facilitate the receipt and processing of comment letters, the Employee Benefits Security Administration (EBSA) encourages interested persons to submit their comments electronically by e-mail to [ORI@dol.gov](mailto:ORI@dol.gov) (enter into subject line: Participant Fee Disclosure Project) or by using the Federal eRulemaking portal at <http://www.regulations.gov>. Persons submitting comments electronically are encouraged not to submit paper copies. Persons interested in submitting paper copies should send or deliver their comments to the Office of Regulations and Interpretations, Employee Benefits Security Administration, Attn: Participant Fee Disclosure Project, Room N-5655, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210. 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, N-1513, Employee Benefits Security Administration, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210.

**FOR FURTHER INFORMATION CONTACT:**

Susan M. Halliday or Kristen L. Zarenko, Office of Regulations and Interpretations, Employee Benefits Security Administration, (202) 693-8510. This is not a toll-free number.

**SUPPLEMENTARY INFORMATION:****A. Background**

According to the Department's most recent data, there are an estimated 437,000 participant-directed individual account plans, covering an estimated 65 million participants, and holding almost \$2.3 trillion in assets.<sup>1</sup> 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 fiduciaries to act prudently and solely in the interest of the plan's participants and beneficiaries. Where 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, including fees and expenses attendant thereto, to make informed decisions about the management of their individual accounts. To some extent, such disclosures are already required by

plans that elect to comply with the requirements of section 404(c) (see § 2550.404c-1(b)(2)(i)(B)). However, compliance with section 404(c)'s disclosure 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 proposed regulation under section 404(a), with conforming amendments to the regulations under section 404(c). These proposals would establish 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 proposal would require participants and beneficiaries to be provided investment-related information in a form that encourages and facilitates a comparative review among investment options.

To facilitate the development of a proposed regulation, the Department published, on April 25, 2007, a Request for Information (RFI) in the **Federal Register**<sup>2</sup> 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. The Department received and reviewed 106 comment letters on these important issues. Copies of these letters are posted on the Department's Web site at <http://www.dol.gov/ebsa/regs/cmt-feedisclosures.html>.

The RFI encouraged persons preparing comments to consider a 2004 report and recommendations of a working group of the ERISA Advisory Council. The Employee Welfare and Pension Benefit Plans' Working Group on Fee and Related Disclosures to Participants reviewed the disclosure requirements applicable to participant-directed individual account plans. The Working Group assessed the adequacy and usefulness of such requirements and recommended changes to the requirements to help participants more effectively manage their retirement savings.<sup>3</sup>

<sup>1</sup> 2005 Form 5500 Data, U.S. Department of Labor. The estimated 437,000 plans include plans that permit participants to direct the investment of all or a portion of their individual accounts.

<sup>2</sup> 72 FR 20457 (April 25, 2007).

<sup>3</sup> This report may be accessed at [http://www.dol.gov/ebsa/publications/AC\\_111704\\_report.html](http://www.dol.gov/ebsa/publications/AC_111704_report.html).

Additionally, the RFI encouraged commenters to consider the Government Accountability Office's (GAO) 2006 report and recommendations contained in "Private Pensions: Changes Needed to Provide 401(k) Plan Participants and the Department of Labor Better Information on Fees."<sup>4</sup> Also relevant to the Department's consideration was the work of the Securities and Exchange Commission (Commission). The Commission has proposed, among other matters, the use of a summary prospectus with additional information provided on an Internet Web site. The proposal is intended to improve mutual fund disclosure by providing investors with key information in plain English in a clear and concise format, while enhancing the means of delivering more detailed information to investors.<sup>5</sup> Following consultation with the Commission, the Department's proposal is coordinated with the Commission's summary prospectus approach where feasible. As ERISA plan investment options include many products not subject to the Commission's disclosure requirements, the Department seeks comments addressing the application of this proposed regulation to funds and investment products not subject to the securities laws.

## B. Overview of Proposal § 2550.404a–5

### 1. General

Paragraph (a) of proposed § 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, plan fiduciaries, 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 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. As discussed below, the proposal addresses the information that must be provided participants and beneficiaries, as well as timeframes for providing that information.

Paragraph (b) of the proposal addresses the disclosure requirements that must be met by plan fiduciaries for plan years beginning on or after January 1, 2009. 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) merely recognizes various acceptable means of disclosure; it does not preclude other means for satisfying disclosure duties under the proposed 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.

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 finalization of this proposal, 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 § 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 in any time period before this regulation is finalized.

### 2. Plan-Related Information

In general, paragraph (c) of the proposal sets forth what is characterized as "plan-related" information. This information falls into three categories—general plan information, administrative expense information and individual expense information. Paragraph (c) also describes when this information must be provided to participants and beneficiaries and requires that it be based on the latest information available to the plan.

First, paragraph (c)(1) of the proposal provides for the disclosure of general plan information regarding: How participants and beneficiaries may give

investment instructions; any specified limitations on such instructions, including any restrictions on transfer to or from a designated investment alternative; 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; the specific designated investment alternatives offered under the plan; and any designated investment managers to whom participants and beneficiaries may give investment directions. Under the proposal, this information is required to be furnished to an individual on or before the date he or she becomes eligible to be a participant or beneficiary under the plan and at least annually thereafter. In addition, the proposal requires that participants and beneficiaries be furnished a description of any material changes to the required information not later than 30 days after the date of adoption of such changes. The Department believes that, by referencing the "date of adoption," the regulation will increase the likelihood that participants and beneficiaries will be provided notification of material changes in advance of the changes becoming effective, thereby putting them in a better position to consider such changes (e.g., changes in designated investment alternatives) in managing their accounts. Paragraph (e)(1) of the proposal provides that the disclosures required by this paragraph (c)(1) may be made as part of the plan's summary plan description, provided that the applicable timing requirements are satisfied.

Second, paragraph (c)(2)(i) sets out the required disclosures for administrative expenses. Specifically, it provides that, on or before the date of an individual's eligibility to become a participant or beneficiary under the plan, and at least annually thereafter, participants and beneficiaries must be furnished an explanation of any fees and expenses for plan administrative services (e.g., legal, accounting, recordkeeping) that, to the extent not included in investment-related fees and expenses, may be charged against the individual accounts of participants or beneficiaries and the basis on which such charges will be allocated to, or affect the balance of, each individual account (e.g., pro rata, per capita). This requirement is intended to ensure that the plan fiduciary informs all participants and beneficiaries about the plan's day-to-day operational expenses that will be charged against their accounts. Because of its general nature,

<sup>4</sup> The GAO report, GAO–07–21, referenced above may be accessed at <http://www.gao.gov/htext/d0721.html>.

<sup>5</sup> 72 FR 67790 (November 30, 2007).

the information described in paragraph (c)(2)(i) may, pursuant to paragraph (e)(1) of the proposal, be disclosed as part of the plan's summary plan description, provided that the applicable timing requirements are met.

In addition to the general disclosures concerning plan administrative expenses, paragraph (c)(2)(ii) of the proposal requires that, at least quarterly, participants and beneficiaries be furnished statements of the dollar amounts actually charged during the preceding quarter to the participants' or beneficiaries' accounts for administrative services, and general descriptions of the services to which the charges relate. The statements should be sufficiently specific to inform the participants or beneficiaries of the actual charge(s) to their accounts and enable them to distinguish the administrative services from other charges and services that may be assessed against their accounts. An identification of the total administrative fees and expenses assessed during the quarter, with, for example, an indication that the charges for plan administrative expenses include legal, accounting, and recordkeeping costs to the plan, would be sufficient. The Department does not believe that it is necessary, or particularly useful, for participants to have administrative charges broken out and listed on a service-by-service basis. Commenters on the Department's RFI argued that an overly detailed breakdown of administrative fees may overwhelm participants and that meaningful information would not be conveyed by such a breakdown. Many commenters explicitly supported the disclosure of "aggregate" or summary fees. The requirement to furnish the information described in paragraph (c)(2)(ii) of the proposal may be satisfied by including the information as part of a quarterly benefit statement furnished pursuant to ERISA section 105(a)(1)(A)(i). See paragraph (e)(2) of the proposal.

Third, paragraph (c)(3) describes the required disclosures for individual expenses. This is identical to paragraph (c)(2) except that it focuses on the disclosure of information relating to individual expenses, i.e., expenses that are assessed on an individual-by-individual, rather than plan-wide, basis. Such expenses might be attendant to a qualified domestic relations order, a participant loan, or investment advice services. Paragraph (c)(3)(i) requires the disclosure of information concerning what expenses might be assessed and paragraph (c)(3)(ii) requires the disclosure of amounts actually assessed and identification of the service to

which an expense relates. Also, like paragraph (c)(2), information described in paragraph (c)(3)(i) may be disclosed in the plan's summary plan description and the information described in paragraph (c)(3)(ii) may be included in a quarterly benefit statement.

The Department invites comments on the type of information required to be disclosed, the timing of the information required to be disclosed and the form in which the information may be disclosed.

### 3. Investment-Related Information

Paragraph (d) of the proposal sets forth the investment-related information required to be furnished or made accessible to participants and beneficiaries in participant-directed individual account plans. Paragraph (d)(1) sets forth the investment-related information required to be automatically furnished to each participant and beneficiary. Paragraph (d)(2) addresses the format of the required information. Paragraph (d)(3) addresses the furnishing of post-investment information. And paragraph (d)(4) sets forth information required to be furnished only upon the request of a participant or beneficiary.

Paragraph (d)(1) provides that, on or before the date of eligibility and at least annually thereafter, participants and beneficiaries must be furnished certain basic information with respect to each designated investment alternative offered under the plan. For purposes of the proposal, paragraph (h)(1) defines the term "designated investment alternative" to mean 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" does 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.

For purposes of identifying the information essential for participants and beneficiaries to consider in evaluating their investment choices under the plan, the Department carefully reviewed the many comments received in response to the RFI, as well as the Commission's proposal for a summary prospectus. The majority of RFI commenters believe that, in addition to basic fee and expense information, participants and beneficiaries need additional disclosure to put fee-related information into context and to educate them about a

plan's investment alternatives. On the basis of its review, the Department concluded that fee and expense information, although important, is only one of the factors to be considered in making informed investment decisions along with investment performance and other information relating to a designated investment alternative. Also, the Department is persuaded by RFI commenters that most participants and beneficiaries will probably not review large amounts of detailed investment information. Information that is too detailed may overwhelm participants, and commenters are concerned that the costs associated with providing overly detailed information, which ultimately will be borne by participants, significantly outweigh any possible benefits. However, the Department also is persuaded that the form in which information is required to be presented should serve to encourage and facilitate its review by participants and beneficiaries. Many commenters on the RFI, for example, supported the disclosure of fee information in a format that would facilitate comparison across a plan's investment alternatives. For this reason, paragraph (d)(2) of the proposal, as discussed later, requires the investment-related information set forth in paragraph (d)(1) to be presented in a comparative format.

Specifically, paragraph (d)(1) requires the following disclosures with respect to each designated investment alternative under the plan:

Paragraph (d)(1)(i) requires, among other items, the name and category (e.g., money market mutual fund, balanced fund, index fund, and whether the investment alternative is actively or passively managed) of the designated investment alternative and an Internet Web site address that is sufficiently specific to lead participants and beneficiaries to supplemental information regarding the investment alternative, including its principal strategies, risks, performance and costs. For example, such information may be contained in a Commission-required prospectus (or other document) made available at a Web site address. The Department believes that ready access to such information via the Internet alleviates the need to automatically furnish otherwise important, detailed investment-related information directly to every participant and beneficiary. This accommodates different levels of participant interest in such information. The Department recognizes that, while many investment fund providers do maintain Web sites to inform interested investors concerning specific investment funds, other providers of

investment funds and products may not. The Department specifically invites comments on what, if any, challenges this proposed requirement may present for service providers and employers, such as in the case of in-house managed funds that might be offered as a designated investment alternative under a plan. The Department also is interested in comments on whether this proposed requirement raises any issues under the Department's rules on the use of electronic media (29 CFR 2520.104b-1(c)), given that plan fiduciaries may, in some cases, have to provide paper copies of the supplemental information listed in this requirement (i.e., information that would otherwise be accessible through the Internet Web site address) to participants who fail to affirmatively consent to receiving such information electronically.

Paragraph (d)(1)(ii) of the proposal requires the disclosure of specified performance data for each of the plan's designated investment alternatives. For designated investment alternatives with respect to which the return is not fixed, e.g., an equity index fund, the fiduciary (or designee) must provide the average annual total return (expressed as a percentage) of the investment for the following periods, if available: 1-year, 5-year, and 10-year, 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. For this purpose, the term "if available" is intended merely to reflect that some plan investments may not have been in existence for 1, 5, or 10 years. In such cases, plans are expected to explain that the data is not available for this reason (e.g., "not applicable" or "not available"). In the case of designated investment alternatives for which the return is fixed for the term of the investment, e.g., a guaranteed investment contract, the fiduciary (or designee) must provide both the fixed rate of return and the term of the investment. For purposes of paragraph (d)(1)(ii), the term "average annual total return" is defined in section (h)(2) of the proposal by reference to standards applicable to open-end management investment companies registered under the Investment Company Act of 1940 (the 1940 Act). The Department specifically invites comments on what, if any, problems the proposed definition presents for investment funds and products that are not subject to the 1940 Act and, if problematic, suggestions for alternative definitions or approaches.

As a corollary to the disclosure of performance data, paragraph (d)(1)(iii)

requires disclosure of performance data for an appropriate broad-based benchmark over time periods that are comparable to the performance data periods required under paragraph (d)(1)(ii). As structured, the proposal provides flexibility in identifying an appropriate benchmark. In general, the Department expects that most plans will simply identify the performance benchmark already being used for the investment option pursuant to the Commission's prospectus requirements, if applicable. The Department seeks comments on whether and how the proposed requirement may need to be modified to include a more narrowly based index that reflects the financial market sector for ERISA plan investment options that are not subject to the securities laws.

Paragraph (d)(1)(iv) specifically addresses the disclosure of fees and expenses attendant to the purchase, holding and sale of each of the plan's designated investment alternatives. For designated investment alternatives with respect to which the return is not fixed, the fiduciary (or designee) must provide: (A) The amount and a description of each shareholder-type fee (i.e., fees charged directly against a participant's or beneficiary's investment), such as sales loads, sales charges, deferred sales charges, redemption fees, surrender charges, exchange fees, account fees, purchase fees, and mortality and expense fees; (B) the total annual operating expenses of the investment expressed as a percentage (e.g., expense ratio); and (C) a statement indicating that fees and expenses are only one of several factors that participants and beneficiaries should consider when making investment decisions. In the case of designated investment alternatives with respect to which the return is fixed for the term of the investment, the fiduciary (or designee) must provide the amount and a description of any shareholder-type fees that may be applicable to a purchase, transfer or withdrawal of the investment in whole or in part. The description of each shareholder-type fee must include the amount on which the charge is applied, e.g., 4% of amount invested. For purposes of paragraph (d)(1)(iv), the term "total annual operating expenses" is defined in paragraph (h)(3) of the proposal by reference to standards applicable to open-end management investment companies registered under the 1940 Act. The Department specifically invites comments on what, if any, problems the proposed definition presents for investment funds and products that are

not subject to the 1940 Act and, any suggestions for alternative definitions or approaches.

The Department has differentiated the fee and expense disclosures required for designated investment alternatives with returns that vary over time from alternatives with fixed returns based on the financial nature of each of these investment types. While the disclosure requirements for investments with respect to which the return is not fixed are more comprehensive, the Department decided that 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. Any fees assessed, of course, are factored into determining the contractual interest rate and RFI commentary suggested that there would be little benefit to participants to disclosing such fees for investments with fixed returns.

Paragraph (d)(1)(v) provides that, for purposes of the requirement that participants be provided information on or before the date they are eligible to be covered under the plan, plan fiduciaries may provide such participants the most recent annual disclosure furnished to participants and beneficiaries pursuant to paragraph (d)(1), in addition to any material changes to the information described in paragraph (c)(1)(i). This provision ensures that new participants receive at least the same information that has been furnished to other plan participants and beneficiaries with respect to the designated investment alternatives under the plan. It also avoids the possible burdens and costs of a requirement that fiduciaries update the required disclosures for each new plan participant, which could result in a daily updating requirement for many plans.

Paragraph (d)(2) of the proposal requires the fiduciary to furnish the information required by paragraph (d)(1) in a chart or similar format that will permit straightforward comparison of the plan's designated investment alternatives by participants and beneficiaries. Many commenters on the RFI supported this requirement and agreed that any required disclosure should enable participants and beneficiaries to easily compare data across a plan's menu of designated investment alternatives. Further, GAO indicated in its 2006 report that plan sponsors should be required to disclose fee information on each 401(k) investment option in a way that

facilitates comparison among the options.<sup>6</sup> The fiduciary's name and contact information must also be provided so that participants and beneficiaries may request the additional information listed in paragraph (d)(4). The chart or similar document also must include a statement informing participants and beneficiaries that more current information about a designated investment alternative, including performance and cost updates, may be available on the Web site for the investment alternative.

In response to commenters on the RFI, the Department has developed a model disclosure form that can be used for purposes of satisfying the disclosure requirements of paragraph (d)(2) of the proposal. The model appears in the Appendix to this regulation. Paragraph (e)(3) of the proposal specifically provides that a fiduciary that uses and accurately completes the model format set forth in the Appendix will be deemed to have satisfied the requirements of paragraph (d)(2) relating to the disclosure of the information in paragraph (d)(1) in a comparative form.<sup>7</sup> The Department notes that the proposal would not mandate use of the model as the exclusive means for satisfying the requirement to provide a chart or similar format that facilitates comparison. This proposal provides fiduciaries with the flexibility to create a chart or comparative format of their own design, provided the required information is displayed in a manner facilitating comparisons.

Paragraph (d)(3) of the proposal requires that when a plan provides for the pass-through of voting, tender and similar rights, the fiduciary 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 requirement is similar to the requirement currently applicable to section 404(c) plans. See § 2550.404c-1(b)(2)(i)(B)(1)(ix).

Paragraph (d)(4) of the proposal requires a fiduciary 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 is modeled on the requirements currently applicable to section 404(c) plans with respect to information to be furnished upon request of a participant or beneficiary. See § 2550.404c-1(b)(2)(i)(B)(2).

#### 4. Timing of Disclosures

As discussed above, each of the various disclosures must be made within specific timeframes. The plan-related information concerning certain administrative procedures and expenses required by subparagraphs (c)(1)(i), (c)(2)(i), (c)(3)(i), and the investment-related information required by subparagraph (d)(1) must be provided to each participant or beneficiary "on or before the date of plan eligibility" and "at least annually thereafter." The proposal defines "at least annually thereafter" in paragraph (h)(4) to mean at least once in any 12-month period, without regard to whether the plan operates on a calendar or fiscal year basis.

The proposal also requires that certain information be provided to participants and beneficiaries on a more frequent basis. Specifically, the actual dollar amounts charged to an individual's account during the preceding quarter for administrative and individual services must be disclosed in a statement to participants and beneficiaries "at least quarterly" pursuant to subparagraphs (c)(2)(ii) and (c)(3)(ii) of the proposal. The proposal defines "at least quarterly" in paragraph (h)(5) to mean at least once in any 3-month period.

#### 5. Other Fiduciary Duties

Paragraph (f) makes clear that nothing in the regulation would relieve a fiduciary of its responsibilities to prudently select and monitor service providers to the plan and the investments made available under the plan (i.e., designated investment alternatives).<sup>8</sup>

### C. Proposed Amendments to § 2550.404c-1

Also included in this notice are proposed amendments to the regulation under section 404(c) of ERISA, 29 CFR § 2550.404c-1. The proposed amendments to section 2550.404c-1(b), (c) and (f) would integrate the disclosure requirements in the section 404(c) regulation with the new proposed section 2550.404a-5 disclosure requirements and thereby avoid having different disclosure rules for plans intending to comply with the section 404(c) requirements. In brief, the proposed amendments to the section 404(c) regulation eliminate references to disclosures encompassed in the new § 2550.404a-5 proposal and incorporate cross-references to the new proposal, thereby establishing a uniform disclosure framework for all participant-directed individual account plans. The Department also is taking this opportunity to reiterate its long held position that the relief afforded by section 404(c) and the regulation thereunder does not extend to a fiduciary's duty to prudently select and monitor designated investment managers and designated investment alternatives under the plan. Accordingly, it is the Department's view that a fiduciary breach or an investment loss in connection with the plan's selection 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.<sup>9</sup> The Department is proposing to amend paragraph (d)(2) (entitled "Limitation on liability of plan fiduciaries") of § 2550.404c-1 to add a new subparagraph (iv) providing that, "[P]aragraph (d)(2)(i) does not relieve a fiduciary from the duty to prudently select and monitor any designated investment manager or designated investment alternative offered under the plan."

#### D. Effective Date

The Department proposes that the regulations and amendments contained in this notice be effective for plan years beginning on or after January 1, 2009. The Department specifically invites comments on the earliest date on which the proposed regulation and amendments can or should be effective, addressing any administrative or programming costs or other issues that should be considered in establishing an effective date.

<sup>9</sup> See 57 FR 46906, 46924, n.27 (preamble to § 2550.404c-1) (October 13, 1992).

<sup>6</sup> See *supra* note 4.

<sup>7</sup> The Department notes that the model set forth in the Appendix includes information and statements that are merely illustrative of the type of information that might appear in the required disclosure. It is the responsibility of each plan fiduciary to assure itself that the information contained in its disclosure statement is complete and accurate. However, such fiduciaries 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).

<sup>8</sup> Also, with regard to ERISA's general fiduciary standards, it should be noted that there may be extraordinary situations when fiduciaries will have a disclosure obligation beyond those addressed by this regulation. For example, if a plan 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).

### E. Regulatory Impact Analysis

As discussed in the preceding sections, the proposed regulation would establish a uniform basic disclosure regime for participant-directed plans. Many of the disclosures contained in the proposed regulation are similar to those required for participant-directed individual account plans that currently comply with section 404(c) and the Department's regulations issued thereunder. For other participant-directed plans which choose not to be section 404(c) compliant there is some uncertainty as to what information is provided to participants; accordingly, the Department is assuming for purposes of this analysis that for some of the plans that choose not to be 404(c) compliant the proposal's disclosure requirements are new.

Given the foregoing assumptions, the average incremental costs and benefits for participants in plans that provide section 404(c) compliant or similar disclosures will be smaller than for those in plans that do not provide this information. Participants in section 404(c) compliant plans or in plans that provide similar information will not

receive as large an added benefit from the proposal's new disclosure requirements because they are already receiving some of the information that would be required under the proposed regulation.

#### 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 "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 proposed regulation in satisfaction of the requirements of the Executive Order and OMB Circular A-4. The Department believes that the proposed regulation's benefits justify its costs. The present value of the benefits over the ten year period is expected to be about \$6.9 billion. The present value of the costs over the same time period is expected to be \$759 million. Overall, the Department estimates that the proposed regulation will generate a net present value (or net present benefit) of almost \$6.1 billion over the time period 2009–2018, as is shown in Table 1.

TABLE 1.—SUMMARY OF DISCOUNTED BENEFITS AND COSTS

Year	Benefits (\$millions/year)	Costs (\$millions/year)
1 2009 .....	914.9	127.3
2 2010 .....	855.0	90.7
3 2011 .....	799.1	84.7
4 2012 .....	746.8	79.2
5 2013 .....	698.0	74.0
6 2014 .....	652.3	69.2
7 2015 .....	609.6	64.7
8 2016 .....	569.8	60.4
9 2017 .....	532.5	56.5
10 2018 .....	497.6	52.8
Total with 7% Discounting .....	6875.6	759.4
Net Present Value 7% Discounting .....		6,116
Net Present Value 3% Discounting .....		7,158

### Need for Regulatory Action

A growing number of workers are preparing for retirement by participating in ERISA governed retirement plans that allow for participant direction of investments. How well plan participants are prepared for retirement is partly determined by how well they have invested their retirement savings. Among the key determinants of the return on an investment are fees and expenses. A one percentage point difference in fees can result in an 18 percent difference in savings.<sup>10</sup>

In developing this proposed regulation, the Department considered why the market alone does not provide transparent fee disclosure to participants comparable to that prescribed by this regulation. In general, the market delivers products that are deemed valuable by consumers. The lack of transparent fee disclosure in this market suggests to the Department that individuals may underestimate the impact that fees and expenses can have on their account balances, and thus

before fees will return roughly \$49,725, while a similar investment with lower fees of 0.5% will return \$60,858—an 18% difference. Invest Wisely: An Introduction to Mutual Funds, <http://www.sec.gov/investor/pubs/inwsmf.htm>.

undervalue transparent fee disclosure. The Department believes that this causes individuals to make uninformed investment decisions that result in inferior outcomes to those that would result from making investment decisions based on full information. Retirement plan characteristics, including disclosure practices, are shaped in significant measure by labor market forces. Employers want to attract and retain productive employees and minimize cost. If employees undervalue disclosure, plans sponsors might underprovide it. Sub-optimal levels of disclosure translate into inefficiencies in participant's choices of investment products and services. Evidence for this

<sup>10</sup> The Commission reported that a \$10,000 investment with an expense ratio of 1.5% invested for 20 years and having an annual return of 10%

undervaluation includes a wide dispersion of fees paid in 401(k) plans. As supported by a report of the Investment Company Institute,<sup>11</sup> the fees that plans pay vary over a wide range. According to their study, 23% of 401(k) stock mutual fund assets are in funds with an expense ratio of less than 50 basis points, while an equal amount of assets are in funds with an expense ratio of over 100 basis points. Some of this variation could be explained by the varying amount of assets in plans and their accompanying economies of scale. In addition, some plans might offer more, or more expensive, plan features. The Department believes, however, that a significant portion of the variation in plan fees is due to market inefficiencies.

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. For example, in plans that offer a large number of investment options, for which the primary communication is a full prospectus-like disclosure, understanding and comparing investment options may be challenging for the less financially savvy or less interested plan participants.<sup>12</sup> Moreover, the process of gathering and comparing information may itself be time consuming.

The proposed regulation 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 the needed information. As a result, plan participants may make better investment decisions and may be better financially prepared for retirement.

<sup>11</sup> Investment Company Institute, "The Economics of Providing 401(k) Plans: Services, Fees, and Expenses, 2006," <http://www.ici.org/pdf/fm-v16n4.pdf>.

<sup>12</sup> For example, the ERISA Advisory Council Working group reported that "The Working Group questions the utility of the prospectus as a source of investment information. While its delivery is required under SEC rules for investment, it lacks any marginal utility to a plan participant in terms of making an investment decision." Report of the Working Group on Prudent Investment Process, 2006, [http://www.dol.gov/ebsa/publications/AC\\_1106A\\_report.html](http://www.dol.gov/ebsa/publications/AC_1106A_report.html). The Department also received similar comments in response to its Request of Information regarding Fee Disclosures to 401(k) Plan Participants from service providers and trade organizations. These comments can be accessed at <http://www.dol.gov/ebsa/regs/cmt-feedisclosures.html>.

## Benefits

The proposed regulation's disclosure requirements will provide important benefits to society. The provision of investment-related information in a comparative format is a new requirement for all participant directed individual account plans, including section 404(c) compliant plans, and is anticipated to be especially beneficial to plan participants. The Department believes that such information will enable participants to make better decisions on how to structure their investments on a prospective basis. These benefits with respect to the provision of investment-related information are quantified in more detail below.

### (a) Reduction in Fees

A review of the relevant literature suggests that plan participants on average pay fees that are higher than necessary by 11.3 basis points per year.<sup>13</sup> The proposal's required disclosure of fees and expenses is expected to result in the payment of lower fees for many participants, assuming that participants will more consistently pick the lower cost comparable investment alternatives under their plans.<sup>14</sup> Selection of the

<sup>13</sup> "Higher than necessary" here means that the participant could have obtained equal value without incurring the expense. This calculation, based on fees paid in 401(k) plans, assumes that participants on average pay 11 or more basis points in unnecessary fees and expenses, in the form of expense ratios or loads. This assumption is conservative in light of evidence on the distribution of investor expense levels presented in: Brad M. Barber, Terrance Odean and Lu Zheng, "Out of Sight, Out of Mind, The Effects of Expenses on Mutual Fund Flows," *Journal of Business* Vol. 79, No. 6 p. 2095–2119 (2005); James J. Choi, David I. Laibson, and Brigitte C. Madrian, "Why Does the Law of One Price Fail? An Experiment on Index Mutual Funds," NBER Working Paper No. W12261 (May 2006); Report, Deloitte Financial Advisory Services LLP, "Fees and Revenue Sharing in Defined Contribution Retirement Plans," (December 6, 2007) (on file with the Department); Edwin J. Elton, Martin J. Gruber, and Jeffrey A. Busse, "Are Investors Rational? Choices Among Index Funds," NYU Working Paper, Social Science Research Network Abstract 340482 (June 2002); Sarah Holden and Michael Hadley, Investment Company Institute, "The Economics of Providing 401(k) Plans: Services, Fees and Expenses 2006," 16 Research Fundamentals, No. 4. (September 2007). This estimate of excess expense does not take into account less visible expenses such as mutual funds' internal transaction costs (including explicit brokerage commissions and implicit trading costs), which are sometimes larger than funds' expense ratios. Deloitte, *supra*; Jason Karceski, Miles Livingston, and Edward O'Neal, "Portfolio Transactions Costs at U.S. Equity Mutual Funds," University of Florida Working Paper (2004) at [http://thefloat.typepad.com/the\\_float/files/2004\\_zag\\_study\\_on\\_mutual\\_fund\\_trading\\_costs.pdf](http://thefloat.typepad.com/the_float/files/2004_zag_study_on_mutual_fund_trading_costs.pdf).

<sup>14</sup> While increased disclosure to plan participants is expected to reduce fees, it is not clear by how much. Some participants may not make optimal use

lower cost comparable investment alternatives will, in turn, result in increased plan participant account investment returns. In addition, the required disclosure could lead to reduced fees<sup>15</sup> in the investment alternatives market as more fee transparency fosters more price competition in the market. Furthermore, the fee disclosure requirements may lead plan fiduciaries to give additional scrutiny to fees, and consequently to select less expensive comparable investment alternatives.

Although participants in section 404(c) compliant plans already receive much of the information that would be required under the proposed regulation, they are expected to receive a substantial incremental benefit. Participants in section 404(c) compliant plans, as well as many participants in plans that are not choosing to be section 404(c) compliant, who invest in mutual funds that are designated investment alternatives under the plan already receive the fee information in the related funds' prospectuses. The proposal's required disclosure of a summary of fee and performance information in a comparable format may nevertheless be beneficial in assisting plan participants to make better investment decisions. Thus, the Department assumes that participants in plans that are not providing disclosures similar to that required under section 404(c) receive a larger added benefit from the proposal's disclosures than plan participants that receive section 404(c) compliant or similar disclosures.<sup>16</sup>

The Department estimates that there will be assets of about \$2.6 trillion in participant-directed individual account

of the disclosed information to reduce fees when making investment decisions. Also, the proposal's disclosures are limited to plan's designated investment alternatives chosen by plan fiduciaries rather than by plan participants.

<sup>15</sup> In their mutual fund experiment, Choi et al. found that presenting the participants with a comparison fee chart, and not just a prospectus, reduced the fees paid by 12% to 49% depending on the group studied.

James J. Choi, David I. Laibson, and Brigitte C. Madrian, May 2006, "Why Does the Law of One Price Fail? An Experiment on Index Mutual Funds," NBER Working Paper No. W12261.

<sup>16</sup> The Department assumes that plan participants that already receive the section 404(c) required information will receive a benefit from the proposal that is two-thirds of that received by participants that do not already receive this information. In addition, the Department assumes that at least 80% of participants in plans that choose not to be 404(c) compliant, nevertheless, receive similar disclosures to participants in section 404(c) compliant plans. The Department specifically requests comments on the percentage of participants that already receive this information and the additional benefits that plan participants will receive due to the proposed regulation.



plans in 2009<sup>17</sup> and that about \$3.0 billion in higher than necessary fees are being paid by plan participants. Assuming the proposal's fee disclosures will reduce the amount of higher than necessary fees paid on average (a) by

10% (11.3 basis points\*10%=1.13 basis points)<sup>18</sup> for participants in section 404(c) compliant plans or plans that provide similar information, and (b) by 15% (11.3 basis points\*15%=1.70 basis points) for participants in plans that do

not receive section 404(c) compliant or similar information, the Department believes that the proposal's fee disclosures will result in \$307 million in fee savings for plan participants in 2009 as shown in Table 2.

TABLE 2.—BENEFITS DUE TO REDUCTION IN FEES (2009)

Type of plan	Total amount of assets in plans (in millions of 2009 dollars)	Basis points of higher than necessary fees	Percent correction due to disclosure	Benefits from reduction in fees (percent)
	(A)	(B)	(C)	(A * B * C)
404(c) Plans and Plans with Similar Information .....	2,500,000	0.11	10	\$282,754,000
Non-404(c) Plans without Similar Information .....	144,000	0.11	15	24,487,000
Total Undiscounted Benefits .....				307,241,000

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

There is some question as to whether some reductions in fees might represent transfers (such as consumer surpluses being recaptured by participants from investment managers) rather than efficiency gains. The Department believes that fee reductions attributable to this proposed regulation will mostly reflect efficiency gains, especially in the longer run. Downward pressure on fees will favor more efficient means of producing investment and other plan services. It will also reflect a diminution of the market for services whose costs exceeds their benefits (such as movement from more active to more passive investment management in cases where the latter is more efficient). However, it is possible that some fraction of reduced fees could reflect a transfer.<sup>19</sup> The Department invites comments on this possibility. Since a purpose of the proposed regulation is to help plan participants increase their retirement savings, and because the expected fee reduction furthers this goal, the Department's motivation is the same irrespective of whether fee savings reflect transfers or efficiency gains. In the absence of information of what portion of fee savings might reflect transfers, for purposes of this assessment all such savings is counted as benefits.

#### (b) Reduction in Participant Search Time

The proposed regulation will benefit plan participants by reducing the time they spend searching for and compiling fee and expense information. Although it is possible that all of these 65 million participants in participant directed individual account plans could benefit from increased disclosure, only a subset will choose to act on the disclosed information. The Department estimates that about at least 29 percent of plan participants will spend time researching their plans' designated investment alternatives fee and expense information and are, therefore, likely to benefit from reduced search time and corresponding reduced costs. This estimate is based on an EBRI survey<sup>20</sup> which found that 29 percent of the respondents that received educational materials from their plans read the materials and made a change in their retirement plan investments. This assumption results in nearly 19 million plan participants that could benefit from reduced search costs. The Department seeks comments on the extent to which this proposal may increase the percentage of plan participants who will spend time researching their plans.

The same EBRI study found that respondents spent 19 hours per year on average planning for retirement. Of

these 19 hours, the Department assumes that one-and-a-half hours could be saved on average for participants that are not receiving information like that required in section 404(c) and one hour for participants that are receiving section 404(c) compliant or similar disclosures based on the proposal's increased fee disclosure information. This assumption results in approximately 19 million hours being saved by affected plan participants as a result of the proposed regulation. The Department seeks comments on this assumption.

In order to convert the time-savings into a dollar estimate, the Department estimated how much the average participants would value the time saved. Since the search time is assumed to be spent during leisure time and in order to adjust for the difference that plan participants attribute to leisure time versus work time, an average total wage rate for private sector workers participating in a pension plan with individual accounts was reduced by 10 percent to derive at an average value rate of leisure time.<sup>21</sup> Using a wage rate of a little less than \$35<sup>22</sup> for private

<sup>17</sup> The Department estimates, using 2005 Form 5500 data, that in 2005 \$2.3 trillion in assets were held in participant directed accounts. To arrive at a 2009 dollar estimate, this number is then adjusted for inflation. This estimate does not include growth due to new participants or contributions and it also ignores increases or decreases due to the returns on the assets. Overall, the Department believes it under estimates the total amount of assets in 2009.

<sup>18</sup> Choi et al. (2006) found that providing comparative fee information to the treatment groups reduced fees by 12% to 49%. While this estimate originated from an experiment using young

educated subjects, the Department believes that the assumptions made here are reasonable as they were selected from the lower range of values.

<sup>19</sup> Fees vary due to the number and type of investment alternatives selected by the plan fiduciary. Nevertheless, plan participants can still influence the amount of fees they pay. Participants can choose among, on average almost 19 alternatives (Vanguard. "How America Saves 2006.") in the plan and select lower cost investment options or change their allocation percentages. Participants can also ask the plan fiduciaries to offer lower cost alternatives.

<sup>20</sup> Employee Benefit Research Institute Issue Brief #292, April, 2006.

<sup>21</sup> Feather and Shaw (1999), using an econometric model, found that the opportunity cost of leisure time is 10 percent less than observed wages for employed workers. See Feather, P. and Shaw, W.D., "Estimating the Cost of Leisure Time for Recreation Demand Models," *Journal of Environmental Economics and Management*, Volume 38, Issue 1, July 1999, Pages 49–65.

<sup>22</sup> This wage rate estimate is based on hourly wages from Panel 7 of the 2001 wave from the Survey of Income Program Participation (SIPP) and

Continued



sector workers participating in a pension plan with individual accounts results in an average value of an hour

of leisure time of \$31 for 2009. Thus, the benefits from reduced search time for plan participants are estimated at \$608

million for 2009 as shown in Table 3 below.

TABLE 3.—BENEFITS FROM REDUCED PARTICIPANT SEARCH TIME (2009)

Type of plan	Number of (affected) participants in participant-directed Accounts (A)	Percentage of participants predicted to make a change in allocation to lower fee investments (B)	Number of search hours saved by participant (C)	Average hourly value of participants' leisure time (in 2009 Dollars) (D)	Total benefits from reduced participant search time (A * B * C * D)
404(c) Plans and Plans with Similar Information .....	62,058,000	29	1.0	\$31.33	\$563,884,000
Non-404(c) Plans without Similar Information .....	3,211,000	29	1.5	\$31.33	43,770,000
Total Undiscounted Benefits .....					607,654,000

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

(c) Summary of Benefits

The quantified benefits of the proposed regulation consist of benefits from the reduction in fees and from the reductions in search time for

participants seeking information on fees, which will occur primarily as a result of the comparative disclosure of investment-related information, and secondarily due to the disclosure of non-investment-related fee and expense

disclosures. Estimates of these total benefits due to prospective fee disclosure are presented in Table 4 and amount to a total net present value of \$6.9 billion over the 10-year period.

TABLE 4.—TOTAL DISCOUNTED BENEFITS OF THE PROPOSAL

Year	Benefits from reduction in fees (A)	Benefits from reduced participant search time (B)	Total benefits (A + B)
2009 .....	\$307,241,000	\$607,654,000	\$914,895,000
2010 .....	287,141,000	567,901,000	855,042,000
2011 .....	268,356,000	530,748,000	799,105,000
2012 .....	250,800,000	496,027,000	746,827,000
2013 .....	234,393,000	463,576,000	697,969,000
2014 .....	219,059,000	433,249,000	652,308,000
2015 .....	204,728,000	404,905,000	609,633,000
2016 .....	191,334,000	378,416,000	569,751,000
2017 .....	178,817,000	353,660,000	532,477,000
2018 .....	167,119,000	330,523,000	497,642,000
Total with 7% Discounting .....			6,875,649,000
Total with 3% Discounting .....			8,038,368,000

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

In addition to the benefits that will derive from the disclosure of investment-related information in a comparative format, which are quantified above, participants also will benefit from a retrospective disclosure of plan administrative fees actually charged to their accounts in the prior quarter. The Department believes that participants who are trying to plan for retirement are entitled to a comprehensive disclosure that includes not only information about fees 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. RFI commentary indicates that participant advocates, plan sponsors and service providers, support such a disclosure requirement.<sup>23</sup> Information about actual charges to participants' accounts may, among other things, help participants understand their current reported account balance, help detect errors in prior charges by the plan, help them in relation to their general household

budgeting and retirement planning, and help insure the reasonableness of the charges. The Department seeks comments that would help quantify the benefits of the retrospective disclosure.

Costs

The regulation may result in increased administrative burdens and costs for plans (or plan sponsors).

(a) Increased Administrative Burden

on wage growth data for private-sector workers that

participate in a pension plan with individual accounts from the Bureau of Labor Statistics (BLS).

<sup>23</sup> These comments can be found under <http://www.dol.gov/ebsa/regs/cmt-feedisclosures.html>.

### Costs Due to Upfront Review and Updating of Plan Documents

Plans are likely to incur administrative burdens and costs in order to comply with the requirements of the regulation. The proposed regulation will require each plan to incur an upfront cost to have the regulation reviewed by professionals,

such as lawyers. This cost will be incurred by all participant-directed individual account plans. The Department assumes it will require a professional to spend one half hour to perform the review.<sup>24</sup> Using in-house labor rates for a legal professional of nearly \$113,<sup>25</sup> the up-front legal review cost is estimated at \$24.6 million. In addition, the Department estimates that

each plan will spend one-half hour of clerical time at an (in-house) hourly rate of \$26 preparing the disclosures. This would result in a cost of \$5.7 million for 2009. The costs of reviewing and preparing plan related information are summarized in Table 5. The Department seeks comments on its assumptions regarding hourly rates and number of hours in the table below.

TABLE 5.—REVIEW AND PREPARE PLAN RELATED INFORMATION, (2009)

Year	Number of participant-directed plans (A)	Legal professional hours required to review each plan (B)	Hourly labor cost for legal professional (in 2009 dollars) (C)	Clerical professional hours required to prepare plan documents (D)	Hourly labor cost for clerical professional (in 2009 dollars) (E)	Review cost (A*B*C) + (A*D*E)
2009 .....	436,862	0.5	\$113	0.5	\$26	\$30,322,591
Total Undiscounted Costs .....						30,322,591

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

Based on the 2005 Form 5500 data, the Department estimates that approximately 59,000 new participant-directed individual account plans would be required to disclose general plan information each year. The Department assumes that writing a new disclosure notice for these plans would

require, on average, one-half hour of legal professional time and one-half hour of clerical time per plan leading to a cost estimate of \$4 million annually. The Department estimates that about 378,000 existing plans will require one-quarter hour of legal professional time and one-quarter hour of clerical staff

time to update plan documents to take into account plan changes, such as new investment alternatives, in subsequent years. This results in a cost of approximately \$13 million as summarized in Table 6. The Department seeks comments on the assumptions used to develop this figure.

TABLE 6.—REVIEW AND UPDATE PLAN RELATED INFORMATION, (SUBSEQUENT YEARS)

Type of plan	Number of participant-directed plans (A)	Legal professional hours required to review each plan (B)	Hourly labor cost for legal professional (in 2009 dollars) (C)	Clerical professional hours required to prepare plan documents (D)	Hourly labor cost for clerical professional (in 2009 dollars) (E)	Review cost (A*B*C) + (A*D*E)
Existing Plans .....	378,000	0.25	\$113	0.25	\$26	\$13,107,000
New Plans .....	59,000	0.50	113	0.50	26	4,109,000
Total undiscounted costs .....						17,216,000

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

### Costs Due to Production of Quarterly Dollar Amount Disclosures

The proposed regulation will require plan administrators to send out disclosures about administrative charges—on a plan-wide as well as a participant-specific basis—to

participants' accounts and engage in record keeping. The increase in administrative costs resulting from disclosing actual dollar fee and expense disclosure is derived from a GAO report that measures the cost of the disclosures of the actual dollar amount of mutual

fund investment expenses on a participant level.<sup>26</sup> The GAO report estimates the initial cost to generate these disclosures in 2001 at \$1 per account,<sup>27</sup> and the annual cost of continued compliance at \$0.35 per account.<sup>28</sup> The cost to plans to calculate

<sup>24</sup> This estimate reflects that plans may employ service providers for making disclosures and that these service providers are likely to spread fixed and start-up costs across many plan clients.

<sup>25</sup> EBSA wage estimates are based on the National Occupational Employment Survey (May 2006, Bureau of Labor Statistics) and the Employment Cost Index (March, 2007, Bureau of Labor Statistics), unless otherwise noted.

<sup>26</sup> GAO-03-551T, "Mutual Funds: Information on Trends in Fees and Their Related Disclosure," March 12, 2003, p. 14.

<sup>27</sup> As a reference, Investment Management Consultants (IMC) has indicated that the cost to plan sponsors of producing an Internet report to comply with PPA ranges from \$0.50 per participant per year for the largest plans to \$3.00 per participant per year for the smallest plans. This

cost, representing what IMC charges plan sponsors for industry-wide information on fees, is based on their data set containing 15,000 plans through September 2007, but does not include costs associated with printing reports, such as postage, stationary, and envelopes.

<sup>28</sup> The GAO report estimates that implementing specific dollar disclosures of fees would cost \$1.00

Continued

administrative fees for purposes of this proposed regulation is expected to be less, because most of the expense information to be disclosed under the regulation is already tracked. The Department assumes it will cost both section 404(c) compliant and non-section 404(c) compliant plans one-third

of the costs of disclosure of investment costs by mutual funds to disclose actual dollars charged, leading to cost estimates of about \$0.41 per plan participant in the first year and \$0.14 thereafter.<sup>29</sup> Thus, the cost to produce the actual dollar disclosure is estimated at \$26.5 million for 2009 as shown in

Table 7.<sup>30</sup> The Department invites comments on the cost to plans to produce actual dollar disclosures of the required fees, including the extent to which the costs differ for plans that are already making actual dollar disclosures and plans that are not.

TABLE 7.—COST OF ADDITIONAL RECORD KEEPING AND OF PRODUCING ACTUAL DOLLAR DISCLOSURES

Year	Number of (affected) participants in participant-directed accounts	Per participant cost from GAO report	Percent of cost for calculating administrative fees	Cost of record keeping and of producing actual dollar disclosures
	(A)	(B)	(C)	(A * B * C)
2009 .....	65,269,000	\$1.22	33	\$26,543,000
Subsequent year .....	65,269,000	0.43	33	9,355,000

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

#### Costs Due to Consolidation of Fee Information

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. The Department estimates that it takes a staff person with some financial background about one hour per plan to consolidate the information from multiple sources for the comparative

chart. Using a wage rate of about \$60 for such an employee, results in estimated costs for the consolidation of fee information from multiple sources of approximately \$26 million for 2009 as shown in Table 8.

TABLE 8.—COST OF CONSOLIDATION OF FEE INFORMATION

Year	Number of participant-directed plans	Average plan staff time (hours) required to consolidate fee information from multiple sources for comparative format	Accountant hourly labor cost (in 2009 dollars)	Cost of consolidation of fee information for comparative format
	(A)	(B)	(C)	(A * B * C)
2009 .....	437,000	1	\$60	\$26,290,000
Total Undiscounted Costs .....				26,290,000

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

#### Costs of Distribution and Materials Due to the Disclosure of Plan and Fee Information

These disclosures must be sent to plan participants on an annual or quarterly basis.<sup>31</sup> The Department assumes that it takes clerical staff two additional minutes to assemble and send out disclosures. The Department also assumes that 38% of disclosures

will be sent electronically and therefore require only a *de minimis* amount of time to prepare. With wage rates of about \$26 for clerical personnel, these dissemination labor costs are estimated at \$35.1 million in 2009, as shown in Table 9.

Following a participant's investment in an investment alternative, the plan must provide any materials it receives regarding voting, tender or similar rights

in the alternative ("pass-through materials") (29 CFR 2550.404a–5(d)(3)). 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 only an estimated number of 699,000 participants will be receiving this

per participant in the initial year (in 2001 dollars). In subsequent years this would annually cost about \$0.35 (in 2001 dollars). This cost estimate includes the cost to enhance the current data processing systems, modify investor communication systems and media, develop new policies and procedures and implement employee training and customer support programs. This estimate does not include the reportedly significant costs that would be borne by third party financial institutions that maintain

accounts on behalf of individual mutual fund shareholders.

<sup>29</sup> The Department used (a) historical CPI data to inflate the \$1.00 estimate to \$1.19 (in 2007 dollars) and the \$0.35 estimate to \$0.42 (in 2007 dollars) and (b) the projected inflation rate from the November 2007 President's Economic Forecast for 2008 (2.1 percent) to inflate the \$1.19 value to \$1.22 and the \$0.42 value to \$0.43 (in 2009 dollars). The President's Economic Forecast can be found at:

<http://www.whitehouse.gov/cea/econ-outlook20071129.html>.

<sup>30</sup> 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.

<sup>31</sup> 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.

information for the first time because of the proposed regulation.

The Department assumes that clerical staff will prepare and send the required materials. It may take the clerical staff

on average one and one-half minutes to prepare and mail the post-investment materials. The Department assumes that this information will be sent annually resulting in nearly 699,000 disclosures.

The Department expects that 38 percent of the disclosures will be sent electronically. Table 9 reports the cost of \$283,000 to prepare and send the required post-investment information.

TABLE 9.—COST OF DISTRIBUTING DISCLOSURES

Type of disclosure	Number of disclosures to be sent	Percentage of disclosures not transmitted via e-mail	Hourly labor cost (in 2009 dollars)	Hours per disclosure	Materials costs for distribution of disclosures
	(A)	(B)	(C)	(D)	(A * B * C * D)
Annual Disclosures	65,269,000	62	\$26.07	0.033	\$35,166,000
Pass-Through Materials .....	699,000	62	26.07	0.025	283,000
Total Undiscounted Costs .....					35,448,000

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

In addition to labor costs associated with the disclosure, plans will also bear materials and postage costs. The annual disclosure is assumed to include 13 pages for plans that are not already providing disclosures similar to section 404(c) disclosures. Plans already providing section 404(c) compliant or similar disclosures are assumed to already be making annual disclosure of

information and are therefore assumed to need to add only three pages of additional information to what they are already disclosing to participants.<sup>32</sup> The pass-through information is assumed to be ten pages and sent on an annual basis to plan participants as described above. Paper and printing costs are assumed to be \$0.05 a page and mailing costs to be \$0.42.<sup>33</sup> It is further assumed that 38

percent of statements will be available electronically. In total, this leads to an estimate for materials and postage of \$8.2 million in 2009 for the annual disclosures as shown in Table 10 and \$473,000 for the post-investment pass-through information as shown in Table 11.

TABLE 10.—ANNUAL DISCLOSURES MATERIALS AND POSTAGE COSTS (2009)

Type of plan	Number of (affected) participants in participant-directed accounts	Percentage of disclosures not transmitted via e-mail	Number of pages for annual disclosure	Paper and printing cost per page	Mailing costs	Materials costs for distribution of disclosures
	(A)	(B)	(C)	(D)	(E)	(A * B) * (C * D + E)
404(c) Plans and Plans with Similar Information .....	62,058,000	62	3	\$0.05	\$0.00	\$5,771,000
Non-404(c) Plans without Similar Information .....	3,211,000	62	13	0.05	0.59	2,468,000
Total Undiscounted Costs .....						8,240,000

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

TABLE 11.—PASS-THROUGH MATERIALS AND POSTAGE COSTS (2009)

Number of disclosures to be sent	Percentage of disclosures not transmitted via e-mail	Number of pages for annual disclosure	Paper and printing cost per page	Mailing costs	Materials costs for distribution of disclosures
	(A)	(B)	(C)	(D) (E)	(A * B) * (C * D + E)
699,000 .....	62	10	\$0.05	\$0.59	\$473,000
Total Undiscounted Costs .....					473,000

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

<sup>32</sup> The proposed regulation would amend the regulation under ERISA section 404(c), 29 CFR 2550.404c-1, to make the disclosure requirements for section 404(c) compliant plans consistent with those that would apply to participant directed individual account plans generally. The Department

assumes for purposes of the economic and paperwork analysis that the disclosure costs of 404(c) compliant plans under the amended regulation would be similar to those absent the proposed regulation.

<sup>33</sup> The postage rate for First-Class Mail is increasing to \$0.42 as of May 12, 2008 ([http://pe.usps.com/2008\\_RateCase/RateCharts/R08\\_Rate\\_Charts.htm](http://pe.usps.com/2008_RateCase/RateCharts/R08_Rate_Charts.htm)).

In total, the Department estimates that in 2009 participant-directed plans incur increased administrative costs of approximately \$127 million.

(b) 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 for small businesses 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 for not offering a retirement plan.<sup>34</sup> Due to very limited data in this area, the Department is not able to quantitatively estimate this impact. The Department seeks comments on the extent to which this proposal discourages small employers from offering retirement plans.

(c) Summary of Costs

The quantified total costs of the proposed regulation include costs due to the increased administrative burden.

Columns (A) and (B) of Table 12 below show the estimated costs of up-front review of the regulation and updating of plan documents. Column (C) shows the costs of producing quarterly Dollar amounts for administrative fees charged to participant accounts. The largest cost of the regulation, though, results from the disclosure of the administrative expenses and investment-related fees that may be charged to participants' accounts—the consolidation of fee information costs, and the distribution and material costs as can be seen in columns (D), (E), and (F). Table 12 reports that the total present value of these costs is estimated at \$759 million over the ten-year period.

TABLE 12.—TOTAL DISCOUNTED COSTS OF PROPOSAL

Year	Up-front review cost	Update plan documents	Consolidation of fee information	Production of quarterly dollar amount disclosures	Distribution materials costs	Staff cost to distribute disclosures	Total costs
	(A)	(B)	(C)	(D)	(E)	(F)	(A + B + C + D + E + F)
2009 .....	\$30,323,000	0	\$26,290,000	\$26,543,000	\$8,713,000	\$35,448,000	\$127,317,000
2010 .....	3,840,000	\$12,250,000	24,570,000	8,743,000	8,143,000	33,129,000	90,675,000
2011 .....	3,589,000	11,448,000	22,963,000	8,171,000	7,610,000	30,962,000	84,743,000
2012 .....	3,353,000	10,699,000	21,461,000	7,637,000	7,112,000	28,936,000	79,199,000
2013 .....	3,134,000	9,999,000	20,057,000	7,137,000	6,647,000	27,043,000	74,018,000
2014 .....	2,929,000	9,345,000	18,745,000	6,670,000	6,212,000	25,274,000	69,176,000
2015 .....	2,738,000	8,734,000	17,518,000	6,234,000	5,806,000	23,621,000	64,650,000
2016 .....	2,559,000	8,162,000	16,372,000	5,826,000	5,426,000	22,075,000	60,421,000
2017 .....	2,391,000	7,628,000	15,301,000	5,445,000	5,071,000	20,631,000	56,468,000
2018 .....	2,234,000	7,129,000	14,300,000	5,089,000	4,739,000	19,281,000	52,774,000
Total with 7% Discounting .....							759,440,000
Total with 3% Discounting .....							880,339,000

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

## Summary

As shown in Table 1 above, the Department concludes that the estimated benefits (\$6.9 billion) of the proposed regulation outweigh its estimated costs (\$759 million) by almost \$6.1 billion over the ten-year period.

## Uncertainty

Although the Department sought to anchor its analysis on empirical evidence, there are a number of variables that are subject to uncertainty. While the Department is confident that increased fee disclosures can induce changes in participant behavior and reductions in plan fees, it is uncertain about the exact magnitude of these

changes. The variables with the most uncertainty in the analysis are:

- The percentage of plan fees that could be saved,
- The percentage of participants that would save search time for fee information,
- The amount of search time saved per participant,
- The time required for legal professionals, clerical professionals<sup>35</sup> and accountants to perform their tasks,
- And the cost to obtain the actual dollar amounts of participant's plan and administrative expenses.

To estimate the influence of these variables on the analysis, the Department re-estimated the costs and benefits of the proposed regulation

under different assumptions for these uncertain variables.

Table 13 presents the effects of changing the variables of interest. The first two variables on the list were decreased, while the remaining variables were increased. Changing the variables of concern by 25 percent still resulted in a net present value of \$5.1 billion. Changing the variables by 50 percent still resulted in a net present value of \$3.6 billion. Even after changing the key variables by 75 percent the net present value of the proposed regulation was \$1.5 billion. The Department, however, does not believe that a change of 75% in these variables is a very likely scenario.

<sup>34</sup> 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.

<sup>35</sup> The clerical time to distribute disclosures remains unchanged in this sensitivity analysis.

TABLE 13.—SENSITIVITY OF BENEFITS AND COSTS TO KEY VARIABLES

Percent change in variables	Benefits (\$millions/ year)	Costs (\$millions/ year)	Net present value (\$millions/year)
25 .....	6,013	866	5,147
50 .....	4,579	973	3,606
75 .....	2,575	1,080	1,495

**Note:** The displayed numbers are rounded to the nearest million.

### Regulatory Alternatives

Executive Order 12866 directs Federal Agencies promulgating regulations to evaluate regulatory alternatives. The Department considered the following alternatives to the proposed regulation, and will also briefly discuss the status quo baseline:

- Extending the existing section 404(c) regulation disclosure requirements to all participant-directed individual account plans;
- Establishing a general, nonspecific disclosure requirement; or
- Requiring more extensive and detailed disclosures.

These alternatives, and the status quo baseline, are described further below:

- Keeping the status quo
- OMB Circular A–4 recommends that “benefits and costs are defined in comparison with a clearly stated alternative. This normally will be a ‘no action’ baseline: what the world will be like if the proposed rule is not adopted.” The Department followed this recommendation, and weighed the option of keeping the status quo and relying on the current regulatory framework. By definition, as the regulatory baseline, this “alternative” would have zero costs and benefits; however, the Department feels it is useful to briefly describe the status quo, and the reasons for rejecting it in favor of a regulation, before we discuss regulatory alternatives. As stated above, regulations already exist specifying the information that must be provided to participants of 404(c) compliant plans

in order to relieve plan fiduciaries of responsibility for participant investment decisions (see § 2550.404c–1(b)(2)(i)(B)). Many of the proposal’s disclosures are identical or similar to the required disclosures of section 404(c) and the regulations issued thereunder. However, compliance with section 404(c) is elective and according to 2005 Form 5500 data only about 275,000 plans covering 49 million participants and beneficiaries make this election. About 16 million participants and beneficiaries are participating in 49,000 participant-directed individual account plans that are choosing not to be section 404(c) compliant and a significant number of these individuals may not receive disclosures in compliance with section 404(c), and, therefore, may not receive the information the Department believes they need to make informed account management and investment decisions.<sup>36</sup> More importantly, the section 404(c) disclosure of investment-related information is not required to be in a comparative format that encourages and facilitates review by plan participants and beneficiaries. Neither does such a requirement exist for any other type of participant-directed individual account plan.

- Extending the existing 404(c) disclosure requirements to all participant-directed individual account plans

The Department considered requiring all participant-directed individual account plans to comply with section 404(c) and the regulations issued

thereunder. This would not have required any additional disclosures to participants in existing section 404(c) compliant plans, and, therefore, may have required less extensive effort by such plans, such as review of the proposed regulation and development of materials in order to come into compliance. Participants and Beneficiaries, however, would also not have had the benefit of receiving critical information in a comparative chart.<sup>37</sup>

Compared to the status quo, only participants in participant-directed individual account plans that do not receive similar information to the required 404(c) disclosures would experience additional benefits by extending the existing 404(c) disclosures. As noted above, the Department assumes that only 20% of the participants of plans that are presently not choosing to be section 404(c) compliant are not receiving similar information. These participants would experience benefits from a reduction in fees (5% of 0.113% of their assets, as shown in Table 14 below) and from a reduction in their search time (0.5 hour for 29% of the affected participants, as shown in Table 15 below). This would lead to annual benefits of approximately \$8.1 million due to the reduction in fees and of about \$14.6 million for the reduction in participant search time. In total, benefits add up to about \$22.8 million, a much smaller amount than the expected benefits of the proposal.

TABLE 14.—ANNUAL BENEFITS DUE TO MANDATORY 404(C) COMPLIANCE, REDUCTION IN FEES

Type of plan	Total amount of assets in affected plans (in millions of 2009 dollars)	Basis points of higher than necessary fees	Percent cor- rection due to 404(c) disclo- sure	Benefits from reduction in fees due to 404(c) disclo- sures
	(A)	(B)	(C)	(A * B * C)
Non-404(c) Plans without Similar Information .....	144,000	0.11%	5%	\$8,162,000

<sup>36</sup> However, the Department recognizes that many plan participants in participant-directed individual account plans that choose not to comply with all of the section 404(c) requirements are receiving similar information to what they would receive if

the plans had chosen to comply with all requirements of section 404(c).

<sup>37</sup> Under the proposal, plans would be required to disclose specified identifying information, past performance data, comparable benchmark returns, and fee and expense information for each

investment alternative. Under the existing 404(c) rule, plans only have to provide past performance data and operating expense information directly or upon request and benchmark returns do not have to be provided.

TABLE 14.—ANNUAL BENEFITS DUE TO MANDATORY 404(c) COMPLIANCE, REDUCTION IN FEES—Continued

Type of plan	Total amount of assets in affected plans (in millions of 2009 dollars)	Basis points of higher than necessary fees	Percent correction due to 404(c) disclosure	Benefits from reduction in fees due to 404(c) disclosures
	(A)	(B)	(C)	(A * B * C)
Total Undiscounted Benefits .....	.....	.....	.....	8,162,000

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

TABLE 15.—ANNUAL BENEFITS DUE TO MANDATORY 404(c) COMPLIANCE, REDUCED PARTICIPANT SEARCH TIME

Type of plan	Number of (affected) participants in participant-directed accounts	Percentage of participants predicted to make a change in allocation to lower fee investments	Number of search hours saved by participant	Average hourly value of participants' leisure time (in 2009 dollars)	Total benefits from reduced participant search time due to 404(c) disclosures
	(A)	(B)	(C)	(D)	(A * B * C * D)
Non-404(c) Plans without Similar Information .....	3,211,000	29%	0.5	\$31.33	\$14,590,000
Total Undiscounted Benefits .....	.....	.....	.....	.....	14,590,000

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

Additional costs for review, update and preparation of related information, as compared to the status quo, would fall on all participant-directed

individual account plans that are presently not choosing to comply with section 404(c).<sup>38</sup> The Department estimates that these costs would amount

to about \$11.3 million in the first year and would fall to \$9.0 million in subsequent years, as shown in Table 16 below.

TABLE 16.—ANNUAL COSTS DUE TO ADDITIONAL REVIEW, UPDATE, AND PREPARATION OF PLAN RELATED INFORMATION

Type of plan	Number of affected participant-directed plans	Legal professional hours required to review each plan	Hourly labor cost for legal professional (in 2009 dollars)	Clerical professional hours required to prepare plan documents	Hourly labor cost for clerical professional (in 2009 dollars)	Review cost
	(A)	(B)	(C)	(D)	(E)	(A * B * C) + (A * D * E)
First Year (2009)						
Existing and New Plans .....	162,000	0.5	\$113	0.5	\$26	\$11,250,000
Total Undiscounted Costs First Year .....	.....	.....	.....	.....	.....	11,250,000
Subsequent Years, Annually						
Existing Plans .....	140,000	0.25	\$113	0.25	\$26	\$4,863,000
New Plans .....	59,000	0.5	113	0.5	26	4,109,000
Total Undiscounted Costs Subsequent Years .....	.....	.....	.....	.....	.....	8,971,000

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

In addition to costs for review, updating, and preparation of information, plans would also incur material and postage costs and labor costs for sending out the required

disclosures to participants that presently are not receiving similar information and would receive the disclosures by mail, rather than via electronic means. As shown in Table 17

and Table 18 below, the Department estimates postage and material costs of about \$2.6 million and labor costs of about \$2 million.

<sup>38</sup>In subsequent years, these costs fall on newly created 404(c) plans and reduced costs for updates are expected for existing 404(c) plans.



TABLE 17.—ANNUAL COSTS FOR ANNUAL ADDITIONAL DISCLOSURES MATERIALS AND POSTAGE AND PASS-THROUGH MATERIALS

Type of plan	Number of (affected) participants in participant-directed accounts (A)	Percentage of disclosures not transmitted via e-mail (percent) (B)	Number of pages for annual disclosure (C)	Paper and printing cost per page (D)	Mailing costs (E)	Materials costs for distribution of disclosures (A * B) * (C * D + E)
Annual Disclosures .....	3,211,000	62	10	\$0.05	\$0.59	\$2,170,000
Pass Through Material .....	699,000	62	10	0.05	0.59	473,000
Total Undiscounted Costs .....						2,643,000

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

TABLE 18.—ANNUAL COSTS OF ADDITIONAL DISTRIBUTING DISCLOSURES

Type of disclosure	Number of disclosures to be sent (A)	Percentage of disclosures not transmitted via e-mail (percent) (B)	Hourly labor cost (in 2009 dollars) (C)	Hours per disclosure (D)	Materials costs for distribution of disclosures (A * B * C * D)
Annual Disclosures .....	3,211,000	62	\$26	0.033	\$1,730,000
Pass-Through Materials .....	699,000	62	26	0.025	283,000
Total Undiscounted Costs .....					2,013,000

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

Table 19 below shows the annual costs and benefits and Table 20 below presents the net present benefit. The Department estimates that extending the existing 404(c) requirements would have resulted in ten-year costs of about \$105 million and benefits of approximately \$171 million. The ten-year net present value would have been about \$66 million (in 2009 dollars).

TABLE 19.—ADDITIONAL BENEFITS AND COSTS OF MANDATORY 404(C) COMPLIANCE FOR ALL PARTICIPANT-DIRECTED INDIVIDUAL ACCOUNT PLANS

	2009 Annual	2010–2018 Annual
<b>Benefits</b>		
Fee Reduction .....	\$8,162,000	\$8,162,000
Reduction in Participant Search Time .....	14,590,000	14,590,000
Total Benefits .....	22,752,000	22,752,000
<b>Costs</b>		
Review, Update, and Preparation of Documents .....	11,250,000	8,971,000
Annual Disclosures and Pass-Through Information .....	2,643,000	2,643,000
Distribution .....	2,013,000	2,013,000
Total Costs .....	15,905,000	13,627,000
Net Benefits in 2009 .....	6,847,000	

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

TABLE 20.—TOTAL (ADDITIONAL) DISCOUNTED BENEFITS OF THE ALTERNATIVE

Year	Additional benefits from extending 404(c), 7% discounting (A)	Additional costs from extending 404(c), 7% discounting (B)	Additional net benefits, 7% discounting (A – B)
2009 .....	\$22,752,000	\$15,905,000	\$6,847,000
2010 .....	21,264,000	12,736,000	8,528,000
2011 .....	19,873,000	11,902,000	7,970,000
2012 .....	18,573,000	11,124,000	7,449,000

TABLE 20.—TOTAL (ADDITIONAL) DISCOUNTED BENEFITS OF THE ALTERNATIVE—Continued

Year	Additional benefits from extending 404(c), 7% discounting (A)	Additional costs from extending 404(c), 7% discounting (B)	Additional net benefits, 7% discounting (A – B)
2013 .....	17,358,000	10,396,000	6,962,000
2014 .....	16,222,000	9,716,000	6,506,000
2015 .....	15,161,000	9,080,000	6,081,000
2016 .....	14,169,000	8,486,000	5,683,000
2017 .....	13,242,000	7,931,000	5,311,000
2018 .....	12,376,000	7,412,000	4,964,000
Total with 7% Discounting .....	170,989,000	104,689,000	66,301,000
Total with 3% Discounting .....	199,905,000	122,007,000	77,898,000

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

- Establishing a general non-specific disclosure requirement

The Department considered establishing a general, non-specific disclosure rule requiring that plan fiduciaries take steps to ensure that participants and beneficiaries of participant-directed individual account plans are provided sufficient information to make informed decisions about the management of their individual accounts without further specifying what information would have to be disclosed. This alternative would have provided fiduciaries with more flexibility in providing disclosures to participants and beneficiaries, but may have also created uncertainty as to the scope of the required disclosures. It is possible that the costs to fiduciaries, and consequently plans, would be lower than the costs under the proposed regulation, but not all participants and beneficiaries may have received the critical information required under the proposed regulation. This approach also may have had the negative effect of having fiduciaries err on the side of being conservative and providing more, but not necessarily useful or meaningful, information to plan participants, creating a disincentive for participants and beneficiaries to review the furnished material.

- Requiring more extensive and detailed disclosures

The Department considered requiring more extensive and detailed prospectus-like disclosure of investment-related information to participants and beneficiaries. However, based on a review of RFI comments and the Commission's summary prospectus initiative, the Department concluded that a user-friendly summary of key information would be more beneficial than more extensive and detailed disclosures. In this regard, the

Department attempted to define the most essential information about available investment options that should be automatically furnished in a comparative format to participants and beneficiaries, and included that information in the proposal. That information includes historical and benchmark performance, and fees and expenses. In addition, the Department considered including information on risk, but believes that risk information is not easily translated into a simple uniform comparative format that can be described in a regulatory standard. The Department notes that in most cases more detailed information, including information on risk is readily available to participants and beneficiaries through Internet Web sites, should they decide to review such information in assessing the various investment options available under their plan. Importantly, under the proposed regulation participants and beneficiaries will be advised that risks exist, and will be directed and encouraged to review more detailed information prior to making decisions concerning the investment options most appropriate for them. The Department invites comments on any additional information that should be required.

#### *Regulatory Flexibility Act*

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 that are likely to have a significant economic impact on a substantial number of small entities. Unless an agency certifies that a proposed rule will not, if promulgated, have a significant economic impact on a substantial number of small entities,

section 603 of the RFA requires that the agency present an initial regulatory flexibility analysis at the time of the publication of the notice of proposed rulemaking describing the impact of the rule on small entities and seeking public comment on such impact. Small entities include small businesses, organizations, and governmental jurisdictions. For purposes of analysis under the RFA, EBSA proposes to continue 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.<sup>39</sup>

Further, while some large employers may have small plans, in general small employers maintain most small plans. Thus, EBSA believes that assessing the impact of these proposed rules on small plans is an appropriate substitute for evaluating the effect on small entities. The definition of small entity considered appropriate for this purpose differs, however, from a definition of small business that is based on size standards promulgated by the Small Business Administration (SBA) (13 CFR 121.201) pursuant to the Small Business Act (15 U.S.C. 631 *et seq.*). EBSA therefore requests comments on the appropriateness of the size standard used in evaluating the impact of these proposed rules on small entities. EBSA

<sup>39</sup> Under ERISA section 104(a)(3), the Secretary may also provide exemptions or simplified reporting and disclosure requirements for welfare benefit plans. Pursuant to the authority of ERISA section 104(a)(3), the Department has previously issued at 29 CFR 2520.104–20, 2520.104–21, 2520.104–41, 2520.104–46, and 2520.104b–10 certain simplified reporting provisions and limited exemptions from reporting and disclosure requirements for small plans, including unfunded or insured welfare plans, that cover fewer than 100 participants and satisfy certain other requirements.

has consulted with the SBA Office of Advocacy concerning use of this participant count standard for RFA purposes. See 13 CFR 121.902(b)(4).

The Department prepared an initial RFA of the proposal because, although the Department considers it unlikely that the rule will have a significant effect on a substantial number of small plans, the Department does not have enough information to certify to that effect. The following subsections address specific requirements of the RFA.

(a) Reasons for and Objectives of the Proposal

A growing number of workers are preparing for retirement by participating in participant-directed plans that are governed by ERISA. Key determinants of the return on an investment include the fees and expenses paid. This proposal is intended to improve the information that is available to participants in participant-directed individual account plans and thereby enable participants to make good investment decisions.

The reasons for and objectives of this proposed 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 proposal is set forth in the "Authority" section of this preamble, below.

(b) Estimating Compliance Requirements for Small Entities/Plans

The Department believes that the effects of this proposed regulation will be to increase retirement savings by reducing investment fees paid by participants. The Department also believes that small plans will benefit from the proposal, because it will clarify what information must be disclosed to plan participants.

While small and large plans will incur administrative costs due to the proposed regulation, these costs are reasonable compared to the benefits and will probably be borne by the participants who will also receive the benefits of the proposed regulation. 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 believes that participants in small plans need as much information about their plan investments as participants in larger plans.

Some expenses, like the legal review of the proposal that plans may incur due to the disclosure requirements of the regulation do not increase proportionally with plan size. Nonetheless, it is possible that small plans incur smaller costs per participant than larger plans. In general, small plans offer fewer and less complex plan investment options than large plans. Less complex plan investments require less extensive disclosures and make disclosures less expensive. Thus, it is

possible that smaller plans will experience lower per-participant disclosure costs than larger plans. The Department invites comments on the validity of this hypothesis.

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 21, the total cost of compliance for a one-participant plan amounts to less than \$134 in the first year and less than that amount in the subsequent years. The costs in 2009 include a review cost of about \$69 per plan (one-half hour of a legal professional's time plus one-half hour of a clerical professional's time), labor costs of \$60 for consolidating the information for the comparative chart (one hour), costs of on average \$0.40 per participant for record keeping 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 (\$2.30 in plans that do not already provide section 404(c) compliant or similar information).

TABLE 21.—COSTS FOR ONE-PARTICIPANT PLAN (UNDISCOUNTED)

Type of cost	404(c) plans and plans with similar information		Non-404(c) plans without similar information	
	Initial year	Subsequent year	Initial year	Subsequent year
Plan Review .....	\$69.00	\$35.00	\$69.00	\$35.00
Consolidation of Information .....	60.00	60.00	60.00	60.00
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	2.30	2.30
Total .....	131.00	96.00	134.00	99.00

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

(c) Considered Alternatives

The Department considered several alternatives that would have required broader or narrower disclosures and which in turn would have increased or decreased the burden on plans. Exempting small plans from the disclosure requirements or limiting the disclosures from small plans would have reduced the costs small plans may incur, but would have also failed to ensure that participants in small plans

receive the information that they need to make good investment decisions.

(d) 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 section

"A. Background" 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 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 these proposed regulations.

(e) Comments

The Department invites interested persons to submit comments regarding the impact on small plans of the proposed regulation and on the Department's assessment thereof. The Department also requests comments on the alternatives considered and its conclusions regarding those alternatives; on any additional alternatives it should have considered; on what, if any, special problems small plans might encounter if the proposal were to be adopted; and what changes, if any, could be made to minimize those problems.

*Paperwork Reduction Act*

As part of its continuing effort to reduce paperwork and respondent burden, the Department of Labor conducts a pre-clearance 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 95) (44 U.S.C. 3506(c)(2)(A)). This helps to ensure that the public understands the Department's collection instructions; respondents can provide the requested data in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the Department can properly assess the impact of collection requirements on respondents.

Currently, the Department is soliciting comments concerning the proposed information collection request (ICR) included in the proposed regulation. A copy of the ICR may be obtained by contacting the PRA addressee shown below or at <http://www.RegInfo.gov>.

The Department has submitted a copy of the proposed regulation to OMB in accordance with 44 U.S.C. 3507(d) for review of its information collections. The Department and OMB are particularly interested 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 Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503; Attention: Desk Officer for the Employee Benefits Security Administration. OMB requests that comments be received within 30 days of publication of the Notice of Proposed Rulemaking to ensure their consideration. Please note that comments submitted to OMB are a matter of public record.

*PRA Addressee:* Gerald B. Lindrew, 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) 219-4745. These are not toll-free numbers.

In connection with publication of this proposed rule, the Department has submitted an ICR to OMB for its request of a revised information collection under OMB Control number 1210-0090. This is the control number for the Department's existing regulation under ERISA section 404(c), which would be amended by the proposal.<sup>40</sup> The public is advised that an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The Department will include a notice

<sup>40</sup> See 29 CFR 2550.404c-1. The information collection provisions of the NPRM impose new hour and cost burdens on all participant directed individual account plans, and the Department intends to include the burden imposed by the proposal on 404(c) and not-404(c) compliant participant directed individual account plans under one control number.

announcing OMB's action at the final rule stage.

The proposed regulation on Fiduciary Requirements for Disclosure in Participant-Directed Individual Account Plans would require the disclosure of plan and investment-related fee and expense information 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 proposal 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 estimates of respondents and responses are derived primarily from the Form 5500 Series filings for the 2005 plan year, which is the most recent reliable data available to the Department. The burden for the preparation and distribution of the disclosures is treated as an hour burden. Additional cost burden derives from materials and postage and costs to track and report required information. It is assumed that electronic means of communication will be used in 38 percent of the responses pertaining to annual notices and that such communications will make use of existing systems that comply with the Department's electronic media disclosure guidance (29 CFR 2520.104b-1(c)). Accordingly, no cost has been attributed to the electronic distribution of the information.

The Department estimates that approximately 437,000 participant directed individual account plans<sup>41</sup> covering 65,269,000 participants would be affected by the proposed regulation. Of these plans, 275,000 plans, covering 49,212,000 participants and beneficiaries are reported to comply with ERISA section 404(c), and the remaining 162,000 plans covering 16,057,000 participants and beneficiaries are not. The Department's estimates of the number of plans and participants are summarized in Table 22 below.

<sup>41</sup> All numbers stated in this document have been rounded to the nearest 1,000. Any apparent discrepancy in the calculations described here is due to this rounding.

TABLE 22.—NUMBER OF PLANS AND PARTICIPANTS

Type of plan	Plans	Participants
404(c) .....	275,000	49,212,000
Non-404(c) .....	162,000	16,057,000
Total .....	437,000	65,269,000

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

*Plan-related Information—29 CFR 2550.404a–5(c).* The proposal requires three subcategories of Plan-related information to be provided to participants and beneficiaries. The first sub-category is General Plan Information, which provides: how participants and beneficiaries may give investment instructions; any specified limitations on such instructions, including any restrictions on transfer to or from a designated investment alternative; 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; the specific designated investment alternatives offered under the plan; and any designated investment managers to whom participants and beneficiaries may give investment directions. (§ 2550.404a–5(c)(1)(i)). This information must be provided on or before the date a participant becomes eligible to participate in the plan, and afterwards at least annually. Material changes to this information must be disclosed not more than 30 days after adoption. Plans may make these disclosures in the summary plan description.

The second subcategory of Plan-related Information is Administrative Expense Information, which refers to an explanation of any fees and expenses for

plan administrative services (e.g., legal, accounting, recordkeeping) that, to the extent not included in investment-related fees and expenses, may be charged against the individual accounts of participants or beneficiaries and the basis on which such charges will be allocated to, or affect the balance of, each individual account (e.g., pro rata, per capita). (§ 2550.404a–5(c)(2)). This information must be provided on or before the date a participant becomes eligible to participate in the plan, and afterwards at least annually. At least quarterly, plans must furnish statements of the aggregate dollar amount charged to each participant's account for these services. Plans may make the initial and annual disclosures in the summary plan description or the quarterly benefit statement, and the quarterly information may be included in the plan's quarterly benefit statements.

The third subcategory of Plan-related Information is Individual Expense Information, which describes expenses charged to individual accounts based on the actions taken by individual participants or beneficiaries. This would include charges for processing participant loans and qualified domestic relations orders. (§ 2550.404a–5(c)(3)). Information describing these charges must be furnished on or before the date a participant's eligibility and annually thereafter. Plans must provide quarterly

statements identifying and showing the dollar amounts of each expense actually charged to an account. Plans may make the initial and annual disclosures in the summary plan description or the quarterly benefit statement, and the quarterly information may be included in the plan's quarterly benefit statements.

#### First Year

*Annual Disclosure:* The Department assumes that in the year of implementation, all 437,000 affected plans will conduct a legal review to verify their compliance with the proposed regulation and prepare the required disclosures. The Department estimates that the review would, on average, take one-half hour of a legal professional's time at an (in-house) hourly rate <sup>42</sup> of \$113 resulting in a total aggregate estimate of approximately 218,000 legal hours at an equivalent cost of approximately \$24,628,000. In addition, the Department estimates that each plan will spend one-half hour of clerical time at an (in-house) hourly rate of \$26 preparing the disclosures. This would result in an hour burden of about 218,000 clerical burden hours with an equivalent cost of approximately \$5,694,000. These estimates are summarized in Table 23 below.

TABLE 23.—PLAN-RELATED INFORMATION, GENERAL INFORMATION, FIRST YEAR

Type of plan	Number of affected plans	Professional hours	Clerical hours	Total professional hours	Total clerical hours	Equivalent cost—professional	Equivalent cost—clerical
404(c) .....	275,000	0.5	0.5	137,000	137,000	\$15,491,000	\$3,582,000
Non-404(c) .....	162,000	0.5	0.5	81,000	81,000	91,370,200	2,112,000
Total .....	437,000	.....	.....	218,000	218,000	24,628,000	5,694,000

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

The Department assumes that plans will send 65,269,000 copies of the required plan information <sup>43</sup> to plan participants and beneficiaries, which will contain an average of 10 pages.

<sup>42</sup> The hourly wage estimates used in this analysis are estimates for 2009 and are based on data from the Bureau of Labor Statistics National Occupational Employment Survey (May 2005) and

Paper and printing costs are expected to be 5 cents per page and mailing costs are expected to be 76 cents per mailed disclosure. It is assumed that 38 percent of the disclosures will be delivered

the Bureau of Labor Statistics Employment Cost Index (Sept. 2006).

<sup>43</sup> While plans are allowed to provide the disclosure in the SPD or quarterly benefit statement,

electronically. This results in a cost burden of \$50,988,000, as shown in Table 24.

the paperwork analysis assumes that plans would provide the required disclosures in a separate mailing to reduce costs as they otherwise are not required to send the SPD every year.

TABLE 24.—PLAN-RELATED INFORMATION, ANNUAL, COST BURDEN

Type of plan	Number of disclosures	Percent sent by mail	Number of pages	Paper and printing cost per page	Mailing cost	Cost burden
404(c) .....	49,212,000	62%	10	\$0.05	\$0.76	\$38,444,000
Non-404(c) .....	16,057,000	62%	10	0.05	0.76	12,544,000
Total .....	65,269,000	.....	.....	.....	.....	50,988,000

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

*Quarterly Disclosure:* Plans will also have to determine the administrative and individual fees that will be charged directly against participants' accounts on a quarterly basis.<sup>44</sup> The Department

estimates a cost burden of approximately \$26,543,000 in the first year to establish new information systems or accounting practices that will collect, track and report the actual

dollar amounts charged to the individual accounts. This cost is shown in Table 25.<sup>45</sup>

TABLE 25.—PLAN-RELATED INFORMATION, COST BURDEN, FIRST YEAR

Type of plan	Number of disclosures	Per participant cost from GAO report	Fraction of cost for calculating administrative fees	Cost burden
404(c) .....	49,212,000	\$1.22	1/3	\$20,013,000
Non-404(c) .....	16,057,000	1.22	1/3	6,530,000
Total .....	65,269,000	.....	.....	26,543,000

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

#### Subsequent Years

*Annual Disclosure:* Based on the 2005 Form 5500 data the Department estimates that approximately 74,000 new participant-directed individual account plans would be required to disclose general plan information each

year.<sup>46</sup> The Department assumes that on average writing a new disclosure notice for these plans would require one-half hour of legal professional time and one-half hour of clerical time per plan.

This results in an hour burden of nearly 37,000 hours for legal

professional work and 37,000 hours of clerical work. The hour burden has an equivalent cost of approximately \$4,168,000 for legal professional time at \$113 per hour and \$964,000 for clerical time at \$26 per hour. These estimates are summarized in Table 26 below.

TABLE 26.—PLAN-RELATED INFORMATION, GENERAL INFORMATION, NEW PLANS, ANNUAL, SUBSEQUENT YEARS

Type of new plans	Number of new plans	Professional hours	Clerical hours	Total professional hours	Total clerical hours	Equivalent cost—professional	Equivalent cost—clerical
404(c) .....	46,000	0.5	0.5	23,000	23,000	\$2,621,000	\$606,000
Non-404(c) .....	27,000	0.5	0.5	14,000	14,000	1,546,000	3,578,000
Total .....	74,000	.....	.....	37,000	37,000	4,168,000	964,000

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

The Department also estimates that 363,000 existing plans will require one-quarter hour of legal professional time and one-quarter hour of clerical staff time to update plan documents to take

into account plan changes, such as new investment alternatives, in subsequent years. This results in an hour burden of approximately 91,000 hours for professional time and 91,000 hours for

clerical time with an equivalent cost of approximately \$10,230,000 for professional time and \$2,365,000 for clerical time as summarized in Table 27 below.

<sup>44</sup> It is assumed that the inclusion of the actual dollar disclosure will add a minimal burden that has not been quantified.

<sup>45</sup> The increase in administrative costs resulting from disclosing actual dollar fee and expense disclosure is derived from a GAO report (GAO-03-551T, "Mutual Funds: Information on Trends in Fees and Their Related Disclosure," March 12, 2003, p. 14), which measures the cost of the disclosures of the actual dollar amount of mutual fund investment expenses on a participant level.

The GAO report estimates the initial cost to generate these disclosures in 2001 at \$1 per account, and the annual cost of continued compliance at \$0.35 per account. The cost to plans to calculate administrative fees for purposes of the NPRM is expected to be less, because most of the expense information to be disclosed under the regulation is already tracked. The Department assumes it may cost plans one-third less to provide these administrative disclosures than it does for mutual funds to disclose investment costs, leading to cost estimates in 2009 dollars of about 41 cents

per plan participant in the first year and 14 cents thereafter.

<sup>46</sup> The 74,000 new plans include newly created participant directed account plans as well as some existing participant directed account plans that newly elect to be 404(c) compliant in subsequent years. Plans that newly elect to be 404(c) compliant in subsequent years had to previously comply with the new requirements and therefore might need to spend slightly less time on the review of the 404(c) requirements than the time indicated in Table 19.

TABLE 27.—PLAN-RELATED INFORMATION, GENERAL INFORMATION, EXISTING PLANS, ANNUAL, SUBSEQUENT YEARS

Existing plans	Number of revised disclosures	Professional hours	Clerical hours	Total professional hours	Total clerical hours	Equivalent cost—professional	Equivalent cost—clerical
404(c) .....	228,000	0.25	0.25	57,000	57,000	\$6,435,000	\$1,488,000
Non-404(c) .....	135,000	0.25	0.25	34,000	34,000	3,795,000	878,000
Total .....	363,000	.....	.....	91,000	91,000	10,230,000	2,365,000

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

As with the first year, the Department assumes that plans will send 65,269,000 copies of the required plan information to plan participants and beneficiaries in all subsequent years, resulting in a cost burden of \$50,988,000.

*Quarterly Disclosures:* In subsequent years, plans will also have to determine the administrative and individual fees that will be charged directly against participants' accounts on a quarterly basis. The Department estimates a cost burden of approximately \$9,355,000 in

the subsequent years to maintain the information systems or accounting practices that will collect, track and report the actual dollar amounts charged to the individual accounts. This cost is shown in Table 28.

TABLE 28.—PLAN-RELATED INFORMATION, COST BURDEN, ANNUAL, SUBSEQUENT YEARS

Type of plan	Number of disclosures	Per participant cost from GAO report	Fraction of cost for calculating administrative fees	Cost burden
404(c) .....	49,212,000	\$0.43	1/3	\$7,054,000
Non-404(c) .....	16,057,000	0.43	1/3	2,302,000
Total .....	65,269,000	.....	.....	9,355,000

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

*Investment-related Information—29 CFR 2550.404a–5(d).* The proposal requires three sub-categories of Investment-related Information to be disclosed, which relates to the plans designated investment alternatives.

*Sub-Category 1: Information to be Provided Automatically*

The first subcategory is information to be provided automatically. (§ 2550.404a–5(d)(1)). For each designated investment alternative, the plan, based on the latest information available, must disclose specified

identifying information, past performance data, comparable benchmark returns, and fee and expense information. This information must be furnished on or before the date of a participant's eligibility and annually thereafter. This information must be furnished in a chart or similar format designed to help participants compare the plan's investment alternatives. (§ 2550.404a–5(d)(2)). To facilitate compliance, the proposal includes a model disclosure form that may be used by plan fiduciaries.

*Preparation:* The Department assumes that the preparation of a comparative chart containing specified identifying information, past performance data, comparable benchmark returns, and fee and expense information will require one hour of accountant or financial professional time at an hourly rate of \$60, which would result in an hour burden of approximately 437,000 hours at an equivalent cost of about \$26,290,000. These estimates are summarized in Table 29 below.

TABLE 29.—INVESTMENT-RELATED INFORMATION, INFORMATION PROVIDED AUTOMATICALLY, PREPARATION

Type of plan	Number of plans	Professional hours	Total professional hours	Equivalent cost—professional
Non-404(c) .....	275,000	1	275,000	\$16,537,000
Non-404(c) .....	162,000	1	162,000	9,754,000
Total .....	437,000	.....	437,000	26,290,000

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

*Distribution:* The comparative chart needs to be sent to all participants (65.3 million). Given that 38 percent (24.8 million) of all disclosures are made

electronically, only 62 percent will be sent by mail (40.5 million). The Department assumes that clerical staff could spend, on average, two minutes

per disclosure to copy and mail this information. This burden is shown in Table 30.



TABLE 30.—INVESTMENT-RELATED INFORMATION, INFORMATION PROVIDED AUTOMATICALLY, ANNUAL, DISTRIBUTION

Type of plan	Total number of participants	Disclosures by mail (percent)	Number of disclosures	Clerical hours per disclosure	Total clerical hours	Equivalent cost—clerical
404(c) .....	49,212,000	62	30,511,000	0.033	1,017,000	\$26,514,000
Non-404(c) .....	16,057,000	62	9,955,000	0.033	332,000	8,651,000
Total .....	65,269,000	.....	40,467,000	.....	1,349,000	35,166,000

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

It is assumed this disclosure will be three pages. As this information is required to be sent on an annual basis, the Department assumes it will be sent

with the plan-related information required pursuant to § 2550.404a–5(c). Mailing costs are already accounted for in the calculation of the cost burden for

delivery of the plan-related information. Table 31 shows the resulting annual cost burden of \$6,070,000.

TABLE 31.—INVESTMENT-RELATED INFORMATION, INFORMATION PROVIDED AUTOMATICALLY, COST BURDEN

Type of plan	Number of disclosures	Percent sent by mail	Number of pages	Paper and printing cost per page	Cost burden
404(c) .....	49,212,000	62	3	\$0.05	\$4,577,000
Non-404(c) .....	16,057,000	62	3	0.05	1,493,000
Total .....	65,269,000	.....	.....	.....	6,070,000

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

#### Sub-Category 2: Post-Investment Information

The second sub-category is post-investment information. The proposal requires that when a plan provides for the pass-through of voting, tender and similar rights, the fiduciary 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. See § 2550.404a–5(d)(3). This requirement is

similar to the requirement currently applicable to section 404(c) plans (“pass-through materials”).

*Distribution:* The Department assumes that clerical staff will prepare and send the required materials. It may take the clerical staff on average one and one-half minutes to prepare and mail the post-investment materials. It is further assumed that this disclosure will be sent to about 15,153,000 plan participants in plans that have assets invested in employer securities. This number was reduced to reflect that some participants

already receive this information pursuant to the Department’s Qualified Default Investment Alternative regulation (QDIA)<sup>47</sup> and the burden is counted under OMB Control Number 1210–0132. The Department expects 38 percent of the disclosures will be sent electronically resulting in no burden. This results in an hour burden of approximately 235,000 hours of clerical staff time, with an equivalent cost of \$6,123,000. Table 32 reports the estimates of the burden.

TABLE 32.—INVESTMENT-RELATED INFORMATION, POST-INVESTMENT INFORMATION, DISTRIBUTION

Type of plan	Number of disclosures	Clerical hours	Total clerical hours	Equivalent cost—clerical
404(c) .....	11,656,000	0.025	181,000	\$4,710,000
Non-404(c) .....	3,497,000	0.025	54,000	1,413,000
Total .....	15,153,000	.....	235,000	6,123,000

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

The required post-investment information is assumed to be, on

average, ten pages long, with mailing costs of \$0.59 per disclosure. As Table

33 shows, this results in an annual cost burden of \$10,240,000.

TABLE 33.—INVESTMENT-RELATED INFORMATION, POST-INVESTMENT INFORMATION, COST BURDEN

Type of plan	Number of disclosures	Percent sent by mail	Number of pages	Paper and printing cost per page	Mailing cost	Cost burden
404(c) .....	11,656,000	62	10	\$0.05	\$0.59	\$7,877,000
Non-404(c) .....	3,497,000	62	10	0.05	0.59	2,363,000

<sup>47</sup> 29 CFR 2550.404c–5 (Oct. 24, 2007).

TABLE 33.—INVESTMENT-RELATED INFORMATION, POST-INVESTMENT INFORMATION, COST BURDEN—Continued

Type of plan	Number of disclosures	Percent sent by mail	Number of pages	Paper and printing cost per page	Mailing cost	Cost burden
Total .....	15,153,000	.....	.....	.....	.....	10,240,000

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

*Sub-Category 3: Information To Be Provided Upon Request*

The third subcategory is information to be provided upon request. (§ 2550.404a–5(d)(4)). Participants may request the plan to provide prospectuses, financial reports, as well as statements of valuation and of assets held by an investment alternative.

*Preparation:* Plans must be prepared to provide the required information on request. The Department expects all plans to receive, on average, one request per year for the information. The Department estimates that plans will need to devote, on average, one clerical staff hour to comply with this requirement. Paperwork burden for this

requirement is divided between § 2550.404c–5 (Fiduciary relief for investments in qualified default investment alternatives), which was accounted for previously under OMB Control Number 1210–0132 (QDIA regulation), and § 2550.404c–1 (ERISA section 404(c) plans), which is reflected in Table 34 below.

TABLE 34.—INVESTMENT-RELATED INFORMATION, INFORMATION ON REQUEST, ANNUAL, PREPARATION

Type of plan	Number of disclosures	Clerical hours	Total clerical hours	Equivalent cost—clerical
404(c) .....	275,000	1	275,000	\$7,164,000
Non-404(c) .....	0	1	0	0
Total .....	275,000	.....	275,000	7,164,000

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

*Distribution:* The Department estimates that in total, plans will respond to approximately 275,000 requests for information annually. It is assumed that 38 percent of the disclosures will be delivered electronically. For the remaining 62

percent of disclosures (170,000 requests annually), the Department has assumed that these disclosures will be sent by mail and estimates that reproduction and distribution of these disclosures will take 2 minutes of clerical time per request. Plans will therefore have an

additional annual hour burden of 5,700 hours (170,000 requests notices × 0.033 hours). The equivalent cost of these hours is \$148,000. Table 35 contains the estimates of the burden.

TABLE 35.—INVESTMENT-RELATED INFORMATION, INFORMATION ON REQUEST, ANNUAL, DISTRIBUTION

Type of plan	Number of disclosures by mail	Clerical hours	Total clerical hours	Equivalent cost—clerical
404(c) .....	170,000	0.033	6,000	\$148,000
Non-404(c) .....	.....	.....	.....	.....
Total .....	170,000	.....	6,000	148,000

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

As some of these disclosures are accounted for under the QDIA regulation, the cost burden for the

remainder is estimated at approximately \$271,000 based on an average page

length of 20 pages and mailing costs of \$0.59 as shown in Table 36, below.

TABLE 36.—INVESTMENT-RELATED INFORMATION, INFORMATION ON REQUEST, ANNUAL, COST BURDEN

Type of plan	Number of disclosures	Percent sent by mail	Number of pages	Paper and printing cost per page	Mailing cost	Cost burden
404(c) .....	275,000	62	20	\$0.05	\$0.59	\$271,000
Non-404(c) .....	0	62	20	0.05	0.59	0
Total .....	275,000	.....	.....	.....	.....	271,000

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

**Summary**

The Department has estimated the hour burden in the first year to be

2,732,000 hours with an equivalent cost of \$105,065,000, as shown in Table 37. The hour burden in the subsequent

years is estimated to be 2,551,000 hours with an equivalent cost of \$92,470,000, as shown in Table 38.

**TABLE 37.—HOURLY BURDEN FOR FIRST YEAR**

Type of plan	Professional hour burden	Clerical hour burden	Total hours	Equivalent cost—professional	Equivalent cost—clerical	Total equivalent cost
404(c) .....	412,000	1,610,000	2,022,000	\$32,028,000	\$41,970,000	\$73,998,000
Non-404(c) .....	243,000	467,000	710,000	18,891,000	12,177,000	31,068,000
Total .....	655,000	2,077,000	2,732,000	50,918,000	54,147,000	105,065,000

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

**TABLE 38.—HOURLY BURDEN FOR YEARS TWO AND THREE**

Type of plan	Professional hour burden	Clerical hour burden	Total hours	Equivalent cost—professional	Equivalent cost—clerical	Total equivalent cost
404(c) .....	355,000	1,553,000	1,908,000	\$25,593,000	\$40,482,000	\$66,075,000
Non-404(c) .....	209,000	433,000	643,000	15,095,000	11,299,000	26,395,000
Total .....	565,000	1,986,000	2,551,000	40,688,000	51,781,000	92,470,000

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

The Department has estimated the cost burden in the first year to be \$94,112,000; and \$76,925,000 in the

subsequent years. These estimates are shown in Table 39.

**TABLE 39.—TOTAL COST BURDEN**

Type of plan	First year—total cost burden	Subsequent years—total cost burden
404(c) .....	\$71,182,000	\$58,223,000
Non-404(c) .....	22,930,000	18,702,000
Total .....	94,112,000	76,925,000

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

*Type of Review:* Revised collection.  
*Agency:* Employee Benefits Security Administration, Department of Labor.

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

*OMB Number:* 1210-0090.

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

*Respondents:* 437,000

*Responses:* 407,042,000

*Frequency of Response:* Annually; quarterly.

*Estimated Annual Burden Hours:* 2,732,000 hours in the first year; 2,551,000 hours in each subsequent year.

*Estimated Annual Burden Cost:* \$94,112,000 in the first year; \$76,925,000 in each subsequent year.

**Congressional Review Act Statement**

This notice of proposed rulemaking 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, if finalized, will be transmitted to the Congress and the Comptroller General for review.

**Unfunded Mandates Reform Act Statement**

For purposes of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4), as well as Executive Order 12875, the notice of proposed rulemaking does not include any federal mandate that will 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 the States, or on the distribution of power and responsibilities among the various levels of government. The proposed regulations would not have federalism implications because they have 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 are not pertinent here, that the provisions of Titles I and IV of ERISA supersede State laws that relate to any employee benefit plan covered by ERISA. The requirements implemented in the

proposed regulations do not alter the fundamental provisions of the statute with respect to employee benefit plans, and as such would have no implications for the States or the relationship or distribution of power between the national government and the States.

#### 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 proposes to amend 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. Where the documents and instruments governing an individual account plan, as defined in section (3)(34), provide for the allocation of

investment responsibilities to participants or beneficiaries, fiduciaries, consistent with 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 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.* For plan years beginning on or after January 1, 2009, the fiduciary (or fiduciaries) of an 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.

(c) *Disclosure of plan-related information.* A fiduciary (or a person or persons designated by the fiduciary to act on its behalf) shall provide to each participant or beneficiary the plan-related information described in paragraphs (c)(1) through (3) of this section, based on the latest information available to the plan.

##### (1) *General.*

(i) On or before the date of plan eligibility 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; and

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

(ii) Not later than 30 days after the date of adoption of any material change

to the information described in paragraph (c)(1)(i) of this section, each participant and beneficiary shall be furnished a description of such change.

##### (2) *Administrative expenses.*

(i) On or before the date of plan eligibility and at least annually thereafter, an explanation of any fees and expenses for plan administrative services (e.g., legal, accounting, recordkeeping) that, to the extent not otherwise included in investment-related fees and expenses, may be charged to the plan and the basis on which such charges will be allocated (e.g., pro rata, per capita) to, or affect the balance of, each individual account, and

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

(A) The dollar amount actually charged during the preceding quarter to the participant's or beneficiary's account for administrative services, and

(B) A description of the services provided to the participant or beneficiary for such amount (e.g., recordkeeping).

##### (3) *Individual expenses.*

(i) On or before the date of plan eligibility 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 for services provided on an individual, rather than plan, basis (e.g., fees attendant to processing plan loans or qualified domestic relations orders, fees for investment advice or similar services charged on an individual basis), and

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

(A) The dollar amount actually charged during the preceding quarter to the participant's or beneficiary's account for individual services, and

(B) A description of the services provided to the participant or beneficiary for such amount (e.g., fees attendant to processing plan loans).

(d) *Disclosure of investment-related information.* A fiduciary (or a person or persons designated by the fiduciary to act on its behalf), based on the latest information available to the plan, shall:

(1) *Information to be provided automatically.* Provide to each participant or beneficiary, on or before the date of plan eligibility 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 the designated investment alternative;

(B) 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;

(C) The type or category of the investment (e.g., money market fund, balanced (stocks and bonds) fund, large-cap fund); and,

(D) The type of management utilized by the investment (e.g., actively managed, passively managed);

(ii) *Performance data.* For designated investment alternatives with respect to which the return is not fixed, the average annual total return (percentage) of the investment for the following periods, if available: 1-year, 5-year, and 10-year, 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. In the case of designated investment alternatives with respect to which the return is fixed for the term of the investment, both the fixed rate of return and the term of the investment;

(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-year, 5-year, and 10-year periods comparable to the performance data periods provided under paragraph (d)(1)(ii) of this section, and which is not administered by an affiliate of the investment provider, its investment adviser, or a principal underwriter, unless the index is widely recognized and used;

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

(A) The amount and a description of each shareholder-type fee (i.e., fees charged directly against a participant's or beneficiary's investment), such as sales loads, sales charges, deferred sales charges, redemption fees, surrender charges, exchange fees, account fees, purchase fees, and mortality and expense fees;

(B) The total annual operating expenses of the investment expressed as a percentage (e.g., expense ratio); and

(C) A statement indicating that fees and expenses are only one of several factors that participants and beneficiaries should consider when making investment decisions. In the case of 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 that may be applicable to a purchase, transfer or withdrawal of the investment in whole or in part;

(v) *Disclosure on or before date of plan eligibility.* The requirement in paragraph (d)(1) of this section to provide information to a participant on or before the date of plan eligibility may be satisfied by furnishing to the participant the most recent annual disclosure furnished to participants and beneficiaries pursuant to paragraph (d)(1) of this section and any material changes to the information furnished to participants and beneficiaries pursuant to paragraph (c)(1)(ii) of this section.

(2) *Comparative format.* Furnish the information described in paragraph (d)(1) 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; as well as:

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

(ii) A statement that more current investment-related information (e.g., fee and expense and performance information) may be available at the listed Internet Web site addresses (see paragraph (d)(1)(i)(B) of this section). Nothing herein, however, shall preclude a fiduciary from including additional information that the fiduciary determines appropriate for such comparisons, provided such information is not inaccurate or misleading;

(3) *Information to be provided subsequent to investment.* Provide 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.* Provide 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 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), (c)(2)(i), and (c)(3)(i) 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) 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 fiduciary that uses and accurately completes the model format set forth in the Appendix will be deemed to have satisfied the requirements of paragraph (d)(2) of this section.

(4) Except with respect to the dollar amounts required to be included under paragraphs (c)(2)(ii)(A) and (c)(3)(ii)(A) of this section, 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 fiduciary 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.* Disclosures under this section shall be furnished in any manner consistent with the requirements of 29 CFR 2520.104b-1 of this chapter, including paragraph (c) of that section relating to the use of electronic media.

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

(1) *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.

(2) *Average annual total return* means 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 with respect to an open-end management investment company registered under the Investment Company Act of 1940.

(3) *Total annual operating expenses* means 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 Securities and Exchange Commission Form N-1A with respect to an open-end management investment company registered under the Investment Company Act of 1940.

(4) *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.

(5) *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.

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**APPENDIX to §2550.404a-5 – Model Comparative Chart****ABC Corporation 401k Savings Plan**

Investment Options – January 1, 200X

Whether you will have adequate savings at retirement will depend in large part on how much you choose to save and how you invest your savings. The following information will assist you in comparing the designated investment options available to you under the **ABC Corporation 401k Savings Plan**.

While the information furnished below is important to making informed investment decisions, you should carefully review all available information about an investment option prior to directing your retirement savings into an investment option. Internet Web site addresses are provided to help you access additional information (such as investment strategies and risks, portfolio holdings and turnover) about each of the plan's investment options. You may also contact your plan representative, [insert name of fiduciary or designee] at [insert telephone number and address] for additional information or visit the Department of Labor's Web site for general information on investing for retirement. See [www.dol.gov/ebsa/investing.html](http://www.dol.gov/ebsa/investing.html)

**Part I. Performance Information**

This chart shows each option's performance over several time periods and compares the performance with a recognized benchmark. For options with returns that vary over time, past performance does not guarantee how your investment in the option will perform in the future; your investment in these options could lose money.

Name/ Type of Option	Mgmt.	Fixed Return/ Term	Average Annual Total Return as of 12/31/0X 1yr. 5yr. 10yr.			Benchmark/Index as of 12/31/0X 1yr. 5yr. 10yr.		
Stock Funds								
A Fund/S&P 500 Index www.Web site.com	Passive	NA	15.6%	6.1%	8.3%	15.8%	6.2%	8.4%
B Fund/Large Cap www.Web site.com	Active	NA	8.9%	.22%	NA	-8.9%	5.9%	12.2%
C Fund/Int'l Stock www.Web site.com	Active	NA	4.3%	5.2%	11.2%	26.9%	15.4%	8.1%
D Fund/Mid Cap ETF www.Web site.com	Passive	NA	15%	12.7%	11.4%	15%	13%	12%
Bond Funds								
E Fund/Bond Index www.Web site.com	Passive	NA	4.3%	5.2%	6.2%	4.3%	5.1%	6.2%
Other								
F Fund/ GICs www.Web site.com	Active	NA	4.7%	4.4%	5%	5%	3%	3.8%
G Fund/Stable Value www.Web site.com	Active	NA	4.3%	4.0%	4.9%	4.7%	3.4%	4.3%
H 200X GIC www.Web site.com	NA	4% 2 yr.	NA	NA	NA	NA		



**Part II. Fees and Expense Information**

This chart shows only investment-related fees and expenses for investment options offered in your plan. 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.

Name/ Type of Option	Total Annual Operating Expenses *	Shareholder/Shareholder-type Fees **
Stock Funds		
A Fund / S&P 500 Index	0.18%	\$20 annual service fee assessed for accounts holding less than \$10,000. May be waived in certain circumstances.
B Fund / Large Cap	2.45%	4.25% deferred sales charge against amounts redeemed within 12 months of purchase.
C Fund/International Stock	0.79%	5.75% sales charge against amounts invested.
D Fund/ Mid Cap ETF	0.20%	4.25% sales charge against amounts invested or redeemed.
Bond Funds		
E Fund/ Bond Index	0.50%	N/A
Other		
F Fund/ GICs	0.46%	10% charge against amounts withdrawn within 18 mos. of initial investment.
G Fund/ Stable Value	0.65%	Dollars withdrawn may not be transferred to a competing fund for 90 days after withdrawal.
H 200X GIC	NA	12% charge against amounts withdrawn before maturity.

For an explanation of non investment-related fees and expenses, such as recordkeeping or loan processing fees that may be charged against your account, you may consult your [SPD], [insert name of annual disclosure used to satisfy § 2550.404a-5(c)], [and] [quarterly benefit statement]. The dollar amount actually charged to your account during the preceding quarter for such administrative or individual expenses will be reported to you on a quarterly basis.

**NOTE: More current information about your plan's investment options, including fees and expenses and performance updates, may be available at the listed Internet Web site addresses.**

\*Total Annual Operating Expenses are ongoing expenses paid indirectly from your investment in this option each year, expressed as a percentage of the value of your investment in the option (e.g., expense ratio).

\*\*Shareholder/Shareholder-type Fees are fees paid directly from your investment in this option (e.g., sales loads, sales charges, deferred sales charges, redemption fees, exchange fees, account fees, purchase fees, transfer or withdrawal fees, surrender charges, contract maintenance fees, and mortality and expense charges).

**BILLING CODE 4510-29-C**

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 subparagraph, 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) Identification of any designated investment managers;

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

(4) 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) of this section with respect to such incidents of ownership.

\* \* \* \* \*

(d) \* \* \*

(2) \* \* \*

(iv) 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.

\* \* \* \* \*

(f) \* \* \*

(1) A plan 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 provides for the pass-through of voting, tender and similar rights incidental to the holding in the account of a participant or beneficiary of an ownership interest in the equity fund or any other investment alternative available under the plan. The plan administrator of Plan A provides each participant and beneficiary with the information described in paragraph (b)(2)(i)(B) of this section upon their entry into the plan (including the information that must be provided on or before plan eligibility pursuant to 29 CFR 2550.404a-5), and provides updated information in the event of any material

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) and (ii). 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 information concerning the latest available value of the participant's or beneficiary's interest in the equity fund. Plan A meets the requirements of paragraph (b)(2)(i)(B) of this section regarding the provision of investment information.

**Note:** The regulation imposes no additional obligation on the administrator to furnish or make available materials relating to the companies in which the equity fund invests (e.g., prospectuses, proxies, etc.).

\* \* \* \* \*

Signed at Washington, DC, this 15th day of July 2008.

**Bradford P. Campbell,**

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

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