U.S. Department of Labor Employee Benefits Security Administration
Washington, DC 20210

FIELD ASSISTANCE BULLETIN NO. 2012-02R[1]

DATE: July 30, 2012

MEMORANDUM FOR: MABEL CAPOLONGO, DIRECTOR OF ENFORCEMENT
REGIONAL DIRECTORS

FROM: JOHN J. CANARY
DIRECTOR OF REGULATIONS AND INTERPRETATIONS

SUBJECT: FEE DISCLOSURE GUIDANCE
29 CFR § 2550.404a-5
29 CFR § 2550.408b-2

BACKGROUND

On October 20, 2010, the Department of Labor (Department) published a final regulation[2] requiring plan administrators to disclose certain plan and investment-related information, including fee and expense information, to participants and beneficiaries in participant-directed individual account plans, *e.g.*, 401(k) plans (the "participant-level disclosure regulation" codified at 29 CFR § 2550.404a-5). At the same time, the Department published conforming changes to 29 CFR § 2550.404c-1 (the "404(c) regulation") relating to plans that allow participants to direct the investment of their individual accounts. This Bulletin supplements the participant-level disclosure regulation by providing guidance on some of the most frequently asked questions concerning the participant-level disclosure regulation and how it may be implemented. In addition, on February 3, 2012, the Department published a final regulation under section 408(b)(2) of the Employee Retirement Income Security Act of 1974 (ERISA). The 408(b)(2) regulation, in relevant part, requires certain covered service providers to furnish specified information to plan administrators so that they may comply with their disclosure obligations in the participant-level disclosure regulation. Consequently, the guidance in this Bulletin also serves as guidance concerning that specific requirement of the 408(b)(2) regulation.

QUESTIONS AND ANSWERS

<u>Scope – Covered Individual Account Plan</u>

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[1] This Field Assistance Bulletin No. 2012-02R supersedes Field Assistance Bulletin No. 2012-02 (issued May 7, 2012) by modifying and replacing Question 30 with a new Question 39, and making a corresponding adjustment to the cross-references to Question 30 in Questions 13 and 29.
[2] 75 FR 64910 (Oct. 20, 2010).

Q-1: A plan has both participant-directed and trustee-directed investments. Participants have the right to make investment decisions with respect to the portion of their accounts attributable to employee contributions. The plan's trustee directs the investment of the remainder of their accounts (*e.g.*, employer contributions). Is this plan covered by the regulation?

A-1: Yes, this plan is a "covered individual account plan" under paragraph (b)(2) of the regulation. This means the plan administrator must comply with the plan-related disclosures in paragraph (c) and the investment-related disclosures in paragraph (d). However, the plan administrator is not required to provide the investment-related information required under paragraph (d) of the regulation for the trustee-directed investments. Rather, the plan administrator's obligation under paragraph (d) is limited to the plan's designated investment alternatives.

Q-2: Does the regulation cover tax-sheltered annuity programs under section 403(b) of the Internal Revenue Code ("403(b) plans") that are ERISA-covered plans?

A-2: Yes. Pursuant to section 401 of ERISA, the regulation covers 403(b) plans established or maintained by tax-exempt organizations. *See* 75 FR 64921. However, consistent with Department's Field Assistance Bulletins 2010-01 and 2009-02, and 29 CFR § 2550.408b-2(c)(1)(ii), the Department will not take enforcement action against any plan administrator who reasonably determines it would be impracticable, or impossible, to obtain the information necessary to meet the disclosure requirements under paragraph (d) of the regulation with respect to any designated investment alternative that is an annuity contract or custodial account described in section 403(b) of the Internal Revenue Code if:

(1) the contract or account was issued to a current or former employee before January 1, 2009;

(2) the employer ceased to have any obligation to make contributions (including employee salary reduction contributions), and in fact ceased making contributions to the contract or account for periods before January 1, 2009;

(3) all of the rights and benefits under the contract or account are legally enforceable against the insurer or custodian by the individual owner of the contract or account without any involvement by the employer; and

(4) the individual owner is fully vested in the contract or account.

In general, a plan's election of the transitional relief provided in the Field Assistance Bulletins as well as the applicability of the exemption in § 2550.408(c)(1)(ii) are evidence of the impracticability of obtaining the information required under paragraph (d) of the regulation. The regulation does not apply to tax-sheltered annuities that are not ERISA-covered plans. *See* 29 CFR § 2510.3-2(f).

<u>Disclosure of Plan-Related Information; General Information</u>

Q-3: If a plan administrator furnishes plan-related and investment-related information together in a single document, must the plan administrator separately "identify" any designated investment alternatives (as required by paragraph (c)(1)(i)(D)) and also "name" each designated investment alternative (as required by paragraph (d)(1)(i)(A))?

A-3: No. The rule does not require that the same information be disclosed twice when plan-related and investment-related disclosures are furnished in a single document. A plan administrator may disclose plan-related information separately from investment-related information, in which case the designated investment alternatives would have to be identified (as required by paragraph (c)(1)(i)(D)) and named (as required by paragraph (d)(1)(i)(A)) in each respective disclosure document. The Department wants to ensure that, regardless of how the disclosures are furnished, participants and beneficiaries obtain the information necessary to make informed decisions related to their plan accounts. However, the Department does not intend that plan administrators provide unnecessarily duplicative information when disclosures are furnished in a single document.

Q-4: Paragraphs (c)(1)(i)(D) and (E) require, respectively, identification of any "designated investment alternatives" under the plan and identification of any "designated investment managers[.]" For purposes of this regulation, what is a "designated investment manager," as distinguished from a designated investment alternative (which is defined in paragraph (h)(4) of the regulation)?

A-4: A designated investment manager ("DIM") is a section 3(38) investment manager that is designated by a plan fiduciary and made available to participants and beneficiaries to manage all or a portion of the assets held in, or contributed to, their individual accounts. When participants appoint a DIM to manage all or a portion of their individual accounts, the DIM becomes responsible for investing their accounts on a participant-by-participant basis. The regulation does not impose any limitations on the investment alternatives that a DIM may use for investing participants' and beneficiaries' accounts. However, a plan may impose limitations by its terms or in its agreement with the DIM (*e.g.*, the DIM may only invest in a plan's designated investment alternatives). *See* questions below, under <u>Definitions</u>, concerning the regulation's definition of a designated investment alternative.

<u>Disclosure of Plan-Related Information; Administrative Expenses</u>

Q-5: Paragraph (c)(2)(i)(A) of the regulation requires an explanation of any fees and expenses for general plan administrative services which may be charged against participants' and beneficiaries' accounts and the basis on which such charges will be allocated. How specific does this explanation have to be in order to comply with this requirement?

A-5: Paragraph (e)(4) of the regulation states that "[e]xcept as otherwise explicitly required herein, fees and expenses may be expressed in terms of a monetary amount, formula, percentage of assets, or a per capita charge." Paragraph (e)(5) also requires that "[t]he information required to be prepared by the plan administrator for disclosure under this section shall be written in a manner calculated to be understood by the average plan participant." The necessary level of detail for any particular explanation, and whether it is written in a manner calculated to be understood by the average plan participant, will depend on the specific facts and circumstances of the particular service and the particular fee or expense.

Thus, when fees for a given service are known at the time of the disclosure, the explanation must clearly identify the service (*e.g.*, recordkeeping), the cost of the services (*e.g.*, .12% of the participant's account balance or $25 per participant), and the plan's allocation method (*e.g.*, pro rata). The following examples are consistent with these principles. Example 1: "The plan divides total recordkeeping costs equally among all individual accounts so that each participant or beneficiary with a plan account will pay $25.00 per year. One fourth of this amount is subtracted from each individual plan account each quarter." Example 2: "An annual recordkeeping fee of .12% of the account balance will be charged to each individual plan account. Each month, an amount equal to .01% of the account's ending balance for the month will be deducted from your individual account." Example 3: "An annual recordkeeping fee of .12% of the account balance will be charged to each individual plan account. Each month, an amount equal to .01% of the account's ending balance for the month will be deducted from your individual account. For example, if your ending account balance for a month is $55,000, then $5.50 will be deducted for that month."

On the other hand, when services, fees, or both are not known at the time of the disclosure, the explanation required under paragraph (c)(2)(i)(A) must reasonably take into account the known facts and circumstances. For example, if a plan administrator reasonably expects the plan to incur legal fees in the upcoming year, such as for legal compliance services, but does not know the precise amount of such fees at the time of the disclosure, an identification of the services that are expected to be performed and the allocation method ordinarily used would be sufficient for purposes of this disclosure. The following example is consistent with these principles: "If the plan incurs any legal expenses, such expenses will be paid from the plan's assets and deducted from individual plan accounts on a pro-rata basis." In these circumstances, the expense amount may be estimated based on the plan's legal expenses in prior years, provided the plan does not have reason to expect that the current year's fees will be substantially different from the prior year's fees, although an estimate is not required under the regulation. For example: "The plan's legal expenses average approximately $1,000 per year. These expenses will be paid from the plan's assets and deducted from individual plan accounts on a pro-rata basis. For example, this means that if the plan's assets total $1,000,000 and your account balance is $10,000, you would pay $10 in legal expenses, and a participant with a $20,000 account balance would pay $20."

Q-6: Pursuant to a plan's existing contract with its recordkeeper at the time of the disclosure required by paragraph (c)(2)(i)(A), the plan agrees to pay a monthly recordkeeping fee not to

exceed 2 basis points of the plan's assets, reduced by any revenue sharing payments received from the plan's designated investment alternatives. Historically, these revenue sharing payments have exceeded the monthly fee in some, but not all, months. How do the principles in the answer to question 5, above, apply to this situation?

A-6: Despite the fact that revenue sharing (or similar) payments, if any, reduce the gross fee amount (2 basis points monthly of the plan's assets, 24 basis points annually), this situation should be treated as if the recordkeeping fees are known at the time of the disclosure. Thus, the explanation required by paragraph (c)(2)(i)(A) must clearly identify the service, the amount or cost of the service, and the plan's allocation method. The following explanation is consistent with these principles. "The plan incurs monthly recordkeeping expenses of up to .02% of the plan's assets. These expenses typically will be deducted from your account on a pro rata basis. However, these monthly expenses may be paid, in whole or in part, from revenue sharing payments that the plan receives from plan investment options. In the past, these payments have completely paid for these recordkeeping expenses in some months. If revenue sharing payments are received, the plan will pay less than .02% of the plan's assets per month, and only those expenses not offset by any revenue sharing payments will be deducted from your account."

Q-7: The plan document provides for the payment of administrative expenses of the plan either from amounts forfeited under the terms of the plan or from the general assets of the employer sponsoring the plan. The plan document does not allow payment of administrative expenses from the individual accounts of plan participants or beneficiaries. Accordingly, the responsible plan fiduciary pays administrative expenses from forfeited amounts held by the plan. When expenses exceed plan forfeitures, the responsible plan fiduciary forwards the service provider's invoice to the plan sponsor, who pays the service provider from the sponsor's general assets. Must this plan's administrative expenses be disclosed under the regulation?

A-7: No. The regulation, in paragraph (c)(2)(i)(A), requires "an explanation of any fees and expenses for general plan administrative services (*e.g.*, legal, accounting, recordkeeping), which may be charged against the individual accounts of participants and beneficiaries and are not reflected in the total annual operating expenses of any designated investment alternative. . . [.]" The administrative expenses in this example are not charged against participant and beneficiary individual accounts and also are not reflected in the total annual operating expenses of designated investment alternatives; instead, they are paid either from the plan's assets that have been forfeited or from the general assets of the employer sponsoring the plan. Accordingly, these fees are not required to be disclosed under the regulation.

Q-8: The plan document provides that administrative expenses shall be paid from the following sources at the discretion of the plan administrator: (1) proportionately from each individual account, (2) from amounts forfeited under the terms of the plan, or (3) from the general assets of the employer sponsoring the plan. The plan's administrative expenses have always been paid either from the plan's forfeiture account or from the general assets of the

employer sponsoring the plan. The plan administrator has never charged the individual accounts of participants and beneficiaries and does not intend to do so in the foreseeable future. In fact, the plan has a written commitment from the employer that it will pay administrative expenses not covered by forfeitures. Must the plan's administrative expenses be disclosed under paragraph (c)(2)(i)(A) of the regulation in these circumstances?

A-8: No. Paragraph (c)(2)(i)(A) of the regulation requires a plan administrator to provide participants and beneficiaries with "an explanation of any fees and expenses for general plan administrative services (*e.g.*, legal, accounting, recordkeeping), which may be charged against the individual accounts of participants and beneficiaries and are not reflected in the total annual expenses of any designated investment alternative, as well as the basis on which such charges will be allocated (*e.g.*, pro rata, per capita) to, or affect the balance of, each individual account." Although administrative expenses could be charged against individual accounts if the employer fails to pay them, the fact that the employer has undertaken this obligation relieves the plan of having to disclose the explanation of these expenses. The disclosure required by paragraph (c)(2)(i)(A) of the regulation is not likely to be a helpful piece of information to participants and beneficiaries if it describes fees and expenses that, in fact, have never been assessed against participants' and beneficiaries' accounts in the past and probably never will be assessed in the future. It may even be confusing to them. In any event, the plan administrator would be required to inform participants and beneficiaries if circumstances were to change such that the plan administrator might prospectively charge the plan's administrative expenses against the individual accounts of participants and beneficiaries. *See* 29 CFR § 2550.404a-5(c)(2)(i)(B).

Q-9: A plan has 10 registered mutual funds as designated investment alternatives. The plan pays a recordkeeping expense of 10 basis points of the plan's total assets by liquidating shares from participants' and beneficiaries' accounts. Thus, paragraph (c) of the regulation requires the plan administrator to disclose this expense. Does the plan administrator have the discretion to disclose this expense under paragraph (d) of the regulation instead, as part of the total annual operating expenses of each of the plan's designated investment alternatives – that is, as if these recordkeeping expenses actually were being paid from assets of the designated investment alternatives?

A-9: No. A plan administrator does not have this discretion under the regulation. Consequently, a plan administrator may not include the cost of a recordkeeping expense in the total annual operating expenses of a plan's designated investment alternatives, unless the fee is actually paid in such a way (*e.g.*, through revenue sharing) as to reduce the rate of return of the designated investment alternatives. *See* question 33. When a fee or expense is charged against the individual accounts of participants and beneficiaries by liquidating shares or deducting dollars, it must be disclosed pursuant to either paragraph (c)(2) or (c)(3) of the regulation.

Q-10: Must the revenue sharing explanation required by paragraph (c)(2)(ii)(C) of the regulation itemize or identify the specific plan administrative expenses being paid from the

total annual operating expenses of one or more of the plan's designated investment alternatives?

A-10: No. Paragraph (c)(2)(ii)(C) of the regulation requires at least quarterly, "[i]f applicable, an explanation that, in addition to the fees and expenses disclosed pursuant to paragraph (c)(2)(ii) of this section, some of the plan's administrative expenses for the preceding quarter were paid from the total annual operating expenses of one or more of the plan's designated investment alternatives . . . [.]" This explanation would be required, for example, when a plan's administrative expenses are paid through revenue sharing arrangements, Rule 12b-1 fees, or sub-transfer agent fees. The Department is concerned that, without this explanation, some participants and beneficiaries would believe that there are few or no administrative expenses associated with their participation in the plan when, in fact, significant amounts may be paid for administrative services from investment-related charges. As the Department explained in the preamble to the final regulation, some information, even if general, would help participants and beneficiaries to better understand that there are administrative fees and expenses attendant to the operation of their plan and that some of those fees and expenses might be indirectly paid by the plan's designated investment alternatives.

Consistent with that view, the Department does not interpret paragraph (c)(2)(ii)(C) of the regulation as requiring an identification of the specific plan administrative expense or expenses being paid or an identification of the specific designated investment alternative or alternatives making the payment. Rather, a statement that some or all of the plan's administrative expenses are paid indirectly through some or all of the plan's designated investment alternatives will satisfy this specific requirement. Of course, paragraph (c)(2)(ii)(C) does not preclude a more detailed explanation identifying the specific administrative expense or expenses being underwritten or an identification of the specific designated investment alternative or alternatives from which the payment is being made.

Q-11: All of a plan's administrative expenses are paid from revenue sharing received by the plan from one or more of the plan's designated investment alternatives. Thus, no fees or expenses are charged to individual accounts in any given quarter. Must the plan administrator furnish to participants and beneficiaries the revenue sharing explanation described in paragraph (c)(2)(ii)(C) of the regulation?

A-11: Yes. Paragraph (c)(2)(ii)(C) of the regulation requires at least quarterly "[i]f applicable, an explanation that, in addition to the fees and expenses disclosed pursuant to paragraph (c)(2)(ii) of this section, some of the plan's administrative expenses for the preceding quarter were paid from the total annual operating expenses of one or more of the plan's designated investment alternatives . . . [.]" Some individuals have interpreted this provision to apply only if the plan allocates some fees or expenses to individuals' accounts. Under this interpretation, if all administrative expenses are paid from such revenue sharing and there are no actual charges to individual plan accounts, the explanation is not required.

The Department does not agree with this interpretation. The requirement for a revenue sharing explanation is not contingent on the plan also allocating at least some administrative expenses to participants' accounts as described in paragraph (c)(2)(ii)(A) of the regulation. The purpose of the explanation is to inform participants and beneficiaries of plans that pay for some or all administrative services through investment-related charges so that they do not think that there are few or no administrative expenses associated with their participation in the plan. *See* 75 FR 64914. The misinterpretation described above may stem from a preamble discussion of a different requirement under the regulation. Specifically, in discussing paragraph (c)(3)(ii) of the rule, the Department stated that "[n]o quarterly statement in compliance with this paragraph (or with paragraph (c)(2)(ii) concerning quarterly disclosure of administrative expenses) must be furnished if there were no charges to a participant's or beneficiary's account during the preceding quarter." *See* 75 FR 64914. This language merely clarifies the requirements of paragraphs (A) and (B) of paragraphs (c)(3)(ii) and (c)(2)(ii). It does not apply to paragraph (c)(2)(ii)(C).

Q-12: Through revenue sharing, a plan's administrative expenses are paid from the total annual operating expenses of one or more of the plan's designated investment alternatives. The plan's administrative expenses accrue on a monthly basis, but revenue sharing payments from the designated investment alternatives for these services are made on a semiannual basis. May the plan include the revenue sharing explanation described in paragraph (c)(2)(ii)(C) in each quarterly statement, even though revenue sharing payments to the plan are made by the designated investment alternatives only every other quarter?

A-12: Yes. In a situation such as that described in this question, if the explanation required by paragraph (c)(2)(ii)(C) of the regulation explains that some of the plan's administrative expenses for the preceding quarter were, or will be, paid from the total annual operating expenses of one or more of the plan's designated investment alternatives, the plan may include the revenue sharing explanation in each quarterly statement.

<u>Disclosure of Plan-Related Information; Brokerage Windows</u>

Q-13: What information must be disclosed under paragraph (c) of the regulation about "brokerage windows," "self-directed brokerage accounts," and other similar plan arrangements that enable participants and beneficiaries to select investments beyond those designated by the plan?

A-13: First, a plan administrator must provide a general description of any such window, account, or arrangement. *See* 29 CFR § 2550.404a-5(c)(1)(i)(F). The regulation does not state how specific and detailed a description must be to satisfy this requirement. Whether a particular description is satisfactory will depend on the facts and circumstances of the specific plan and the specific window, account, or arrangement. At a minimum, however, this description must provide sufficient information to enable participants and beneficiaries to understand how the window, account, or arrangement works (*e.g.*, how and to whom to give investment instructions; account balance requirements, if any; restrictions or limitations on trading, if any; how the window, account, or arrangement differs from the plan's designated investment alternatives) and whom to contact with questions.

Second, a plan administrator also must provide an explanation of any fees and expenses that may be charged against the individual account of a participant or beneficiary on an individual, rather than on a plan-wide, basis in connection with any such window, account, or arrangement. *See* 29 CFR § 2550.404a-5(c)(3)(i)(A). This would include: (1) any fee or expense necessary for the participant or beneficiary to start, open, or initially access such a window, account, or arrangement (such as enrollment, initiation, or start up fees), or to stop, close or terminate access; (2) any ongoing fee or expense (annual, monthly, or any other similarly charged fee or expense) necessary for the participant to maintain access to the window, account, or arrangement, including inactivity fees and minimum balance fees; and (3) any commissions or fees (*e.g.*, per trade fee) charged in connection with the purchase or sale of a security, including front or back end sales loads if known; but would not include any fees or expenses of the investment selected by the participant or beneficiary (*e.g.*, Rule 12b-1 or similar fees reflected in the investment's total annual operating expenses). The Department understands that in some circumstances the specific amount of certain fees associated with the purchase or sale of a security through a window, account, or arrangement, such as front end sales loads for open-end management investment companies registered under the Investment Company Act of 1940, may vary across investments available through the window or may not be known by the plan administrator or provider of the window, account, or arrangement in advance of the purchase or sale of the security by a participant or beneficiary. In recognition of the foregoing, a general statement that such fees exist and that they may be charged against the individual account of a purchasing or selling participant or beneficiary, and directions as to how the participant can obtain information about such fees in connection with any particular investment, ordinarily will satisfy the requirements of paragraph (c)(3)(i)(A) of the regulation. Otherwise, plan administrators might inundate participants and beneficiaries with information about the cost of buying or selling all the various securities available through a window, account, or arrangement, despite the fact that participants and beneficiaries may not have the interest or expertise to purchase or sell each or any such security. Further, the statement should advise participants and beneficiaries to ask the provider of the window, account, or arrangement about any fees, including any undisclosed fees, associated with the purchase or sale of a particular security through a window, account, or arrangement, before purchasing or selling such security.

Third, a plan administrator also must provide participants and beneficiaries with a statement of the dollar amount of fees and expenses that actually were charged during the preceding quarter against their individual accounts in connection with any such window, account, or arrangement. *See* 29 CFR § 2550.404a-5(c)(3)(ii)(A). A statement of these fees must include a description of the services to which the charge relates. *See* 29 CFR § 2550.404a-5(c)(3)(ii)(B). The description of the services must clearly explain the charges (*e.g.*, $19.99 brokerage trades, $25.00 brokerage account minimum balance fee, $13.00 brokerage account wire transfer fee, $44.00 front end sales load).

See also question 39.

Disclosure of Plan-Related Information; Individual Expenses

Q-14: A plan provides a brokerage window, self-directed brokerage account, or similar arrangement that enables participants and beneficiaries to select investments beyond those designated by the plan as investment alternatives, but only a small percentage of the plan's participants and beneficiaries presently select such a window, account, or arrangement. May the plan administrator furnish the required annual fee and expense information described in paragraph (c)(3)(i)(A) only to those participants and beneficiaries who have affirmatively elected to use the window, accounts, or arrangement?

A-14: No. The plan administrator must furnish the required annual fee and expense information to all participants and beneficiaries so that they have sufficient information to make informed decisions about whether to direct the investment of their assets into such arrangements. The disclosure requirement in paragraph (c)(3)(i)(A) is not conditioned on a prior investment decision of a specific participant or beneficiary. Similarly, under paragraph (c)(3)(i)(A), a participant is not required to take a plan loan in order to receive disclosures about the fee and expense information associated with plan loans.

Disclosure of Investment-Related Information; Generally

Q-15: Must a plan administrator furnish the disclosures required under paragraph (d) for a designated investment alternative that is closed to new investments, but that allows participants and beneficiaries to maintain prior investments in the alternative and to transfer their interests to other plan investment alternatives?

A-15: Yes. A plan administrator must furnish the disclosures required by paragraph (d) of this regulation to participants and beneficiaries for each designated investment alternative on the plan's investment platform even if the alternative is closed to new money. In the Department's view, the required disclosures are as important for deciding whether to transfer out of a designated investment alternative as they are for deciding whether to invest in a designated investment alternative. Consequently, participants and beneficiaries are entitled to, and have the same need for, information about a designated investment alternative that is closed to the inflow of new money as a designated investment alternative that is accepting new money. The plan administrator is not required, but may choose, to provide the disclosures required by paragraph (d) about the closed alternative as part of a comparative document furnished only to those participants or beneficiaries that remain invested in that alternative.

Disclosure of Investment-Related Information; Benchmarks

Q-16: If a plan administrator furnishes an additional benchmark for a designated investment alternative that is a balanced fund by blending more than one appropriate broad-based

securities market index, may the plan administrator use the target asset allocation of the designated investment alternative (*e.g.*, 50% stocks, 50% bonds) to determine the weightings of the indexes used in creating the additional benchmark?

A-16: Yes, if the target is representative of the actual holdings of the designated investment alternative over a reasonable period of time. The Department has already acknowledged the permissibility of disclosing blended benchmark returns, in addition to the required benchmark returns, provided that the additional benchmark returns are not inaccurate or misleading. *See* 75 FR 64917. Whether a time period is "reasonable" under this standard is dependent on the facts and circumstances; however, in the Department's view, a period that is the same as covered by the benchmark returns (*e.g.*, 1-, 5-, or 10-year period) would not be unreasonable. Similarly, whether a target asset allocation is representative of the actual holdings of a designated investment alternative is dependent on the facts and circumstances; however, in the Department's view, target percentages ordinarily would be representative of an alternative's actual holdings if they are nearly equal to the daily average of the alternative's ratios of stocks and bonds (*e.g.*, 50% stocks, 50% bonds) over a reasonable period of time. The Department anticipates there are other similarly acceptable methods of determining whether target percentages are representative of actual holdings.

<u>Disclosure of Investment-Related Information; Internet Web Site Address</u>

Q-17: Are there alternatives to creating a plan Web site that a plan administrator may use to comply with the Web site address requirement?

A-17: Yes. Plan administrators have multiple ways to satisfy their obligation to provide a Web site address under paragraph (d)(1)(v). For example, a plan administrator may contract with a third party administrator or recordkeeper to establish and maintain the Web site for the plan. Alternatively, a plan administrator may use the existing Web site address of the employer who sponsors the plan to make available the required supplemental investment information. The plan administrator also may use Web site addresses provided by the issuers of the designated investment alternative(s) (*e.g.*, the family of mutual funds comprising the plan's investment platform) as long as this address is sufficiently specific to lead the participant to the required information. *See* question 18, below.

Although the plan administrator is responsible for ensuring the availability of a Web site address, under paragraph (b)(1) of the regulation a plan administrator will not be responsible for the completeness and accuracy of information used to satisfy the regulation's disclosure requirements, including the Web site address requirement, when the plan administrator reasonably and in good faith relies on information received from or provided by a plan service provider or the issuer of a designated investment alternative.

Q-18: Does the Web site address landing page have to include all of the required supplemental investment information regarding a designated investment alternative?

A-18: No. Paragraph (d)(1)(v) of the regulation requires that the Web site address be sufficiently specific to lead the participant to supplemental investment-related information regarding designated investment alternatives. This requirement should not be read to require that the Web site address landing page must include all of the supplemental investment-related information required by this regulation. The furnished Web site address must, however, be sufficiently specific to provide participants and beneficiaries access to the information without difficulty.

Whether an address is "sufficiently specific" will depend upon the facts and circumstances. A plan administrator should consider, for example, the user-friendliness of the Web site, the number and complexity of the plan's designated investment alternatives, and the computer literacy of the average plan participant.

Q-19: What return information for a plan's designated investment alternatives must be made available at the required Web site address?

A-19: Performance data for a plan's designated investment alternatives (described in paragraph (d)(1)(ii) of the regulation) must be included in the supplemental investment-related information available on the Web site, updated on at least a quarterly basis. *See* 29 CFR § 2550.404a-5(d)(1)(v)(E).

For designated investment alternatives that do not have a fixed return, the Web site address must enable the participants and beneficiaries to obtain the average annual total return for 1-, 5-, and 10-year periods (or for the life of the alternative, if shorter) ending on the date of the most recently completed calendar quarter[3] (or more current information if required by applicable law).

For designated investment alternatives with a fixed or stated return over the term of the investment, a Web site address must be sufficiently specific to provide participants and beneficiaries access to the current fixed or stated rate of return and the term of the investment. In some cases, such as when the issuer reserves the right to adjust the fixed or stated return, the information on the Web site may be different than the information provided on the annual comparative chart.

The regulation does not have a specific requirement for updating the supplemental information. However, as noted in the preamble of the regulation, at 75 FR 64920, the information made available on the Web site should be accurate and reasonably current, since participants and beneficiaries will have continuing access to the required Web site.

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[3] It has come to the Department's attention that, as initially released on May 7, 2012, this portion of the sentence stated "... recently completed calendar *year* ..." (emphasis added) when it should have stated "... recently completed calendar *quarter* ..." (emphasis added). On May 17, 2012, the word "year" was deleted and replaced by the word "quarter" in order to accurately restate the requirements of paragraph (d)(1)(v)(E) of the regulation. The word "calendar" also was removed from the phrase "... 10-calendar year periods ..." in the same sentence.

A plan administrator may, pursuant to paragraph (d)(2)(ii), include on the comparative chart, or at the required Web site address, additional information that the plan administrator determines to be appropriate as long as the information is not inaccurate or misleading. The Department would not, for this purpose, consider the inclusion of additional performance data on the Web site, such as year–to-date returns or returns for the most recently completed calendar month or quarter, reported consistently, to be misleading.

Disclosure of Investment-Related Information; Glossary

Q-20: **The final rule requires a general glossary of terms to help participants and beneficiaries in understanding designated investment alternatives, or an Internet Web site address for such a glossary. *See* paragraph (d)(1)(vi). The preamble to the final rule noted that the Department is interested in further exploring whether it should develop, or identify, general investment glossaries that could be used by plan administrators to satisfy their obligations under the final rule. In this regard, the Department specifically invited interested parties to share their views as to what terminology should be addressed in a general investment glossary and whether, or to what extent, such glossaries currently exist that could serve as a resource for the average participant-investor. Did the Department receive any input in response to this request? Does the Department plan to publish a glossary for use in compliance with its regulation?**

A-20: The Department received two submissions from industry groups with sample glossaries. One sample, entitled Sample Glossary of Collective Investment Fund Terms for Disclosures to Retirement Plan Participants, January 2012, was developed by the American Bankers Association and its member banks. This one defines terms that are commonly used by bank collective investment funds. This sample is available at www.aba.com. The other sample, entitled Sample Glossary of Investment-Related Terms for Disclosures to Retirement Plan Participants, December 2011, was developed by the SPARK Institute and the Investment Company Institute and endorsed by the American Benefits Council, the American Council of Life Insurers, the American Society of Pension Professionals & Actuaries, and the Society for Human Resource Management. This sample is available at www.sparkinstitute.org.

The Department is appreciative of the efforts of these organizations in developing and providing glossaries for use and adaptation by plan administrators to fulfill their disclosure obligations under the final rule. At this juncture, the Department does not intend to publish its own sample glossary. The Department continues to believe that plan administrators, in conjunction with their service providers and issuers of investment alternatives, are in the best position to determine the glossary (or glossaries) appropriate for their participants, taking into consideration their plans' investment alternatives.

Disclosure of Investment-Related Information; Comparative Format

Q-21: Must a plan administrator furnish a single, unified comparative chart or may multiple charts, supplied by the plan's various service providers or investment issuers, be furnished to participants and beneficiaries?

A-21: Plan administrators may furnish multiple comparative charts or documents that are supplied by the plan's various service providers or investment issuers, provided all of the comparative charts or documents are furnished to participants and beneficiaries at the same time in a single mailing or transmission and the comparative charts or documents are designed to facilitate a comparison among designated investment alternatives available under the plan. However, as stated in the preamble, permitting individual investment issuers, or others, to separately distribute comparative documents reflecting their particular investment alternatives would not facilitate a comparison of the core investment information and therefore would not satisfy the plan administrator's obligations under paragraph (d)(2).

Q-22: If there is a change to a designated investment alternative's fee and expense information after the plan administrator has furnished the annual disclosure ("comparative chart") to participants and beneficiaries pursuant to paragraph (d), does the plan administrator have an obligation under the regulation to automatically furnish a new comparative chart to participants and beneficiaries who received a comparative chart before the change occurred?

A-22: No. Paragraph (d) of the regulation does not require plan administrators to furnish more than one comparative chart annually to participants and beneficiaries. However, fee and expense information must be made available on a Web site, *see* questions 17 through 19, above, and information made available on the Web site must be accurate and updated as soon as reasonably possible following a change. *See* question 19. The Web site also should reflect the date on which it was most recently updated. Further, under extraordinary circumstances, the duties of prudence and loyalty under section 404 of ERISA may require the plan administrator to inform participants and beneficiaries of important changes to investment-related information before the next comparative chart is required under the regulation. *See* 75 FR 64922, n. 17 (preamble to the final regulation).

Q-23: For designated investment alternatives with variable rates of return, may a plan administrator furnish on the comparative chart average annual total return information that is more recent than the end of the most recently completed calendar year?

A-23: Yes. The Department would consider a plan to be in compliance with paragraph (d)(1)(ii)(A) of the regulation if the plan administrator furnished the average annual total return of each designated investment alternative with variable rates of return for 1-, 5- and 10-year periods (or for the life of the alternative, if shorter) as of the date of the most recently completed calendar month or quarter. However, to ensure appropriate comparability, the same ending date for a particular period ordinarily would have to be used for all designated investment alternatives under the plan, and the associated benchmark information would have to correspond to the same time period.

Q-24: The Model Comparative Chart published by the Department with the final rule includes "since inception" performance and benchmark information for all designated investment alternatives. Is a plan administrator required to include "since inception" information for all of a covered individual account plan's designated investment alternatives?

A-24: No. A plan administrator is only required to furnish "since inception" performance data (including benchmarks) for designated investment alternatives that have been in existence for less than 10 years. The regulation provides that performance data (paragraph (d)(1)(ii) of the regulation) and benchmarks (paragraph (d)(1)(iii) of the regulation) must be disclosed "for 1-, 5-, and 10-calendar year periods (*or for the life of the alternative, if shorter*)[.]" Emphasis added. Accordingly, if a plan administrator discloses performance and benchmark information for each of these 1-, 5-, and 10-year periods, "since inception" information is not required to be disclosed. However, nothing in the regulation precludes a plan administrator from including "since inception" data, for example as set forth on the Department's Model Comparative Chart, provided such information is not inaccurate or misleading. *See* paragraph (d)(2)(ii).

<u>**Disclosure of Investment-Related Information; Information to be Provided Upon Request**</u>

Q-25: What disclosures are required by paragraph (d)(4)(i) of the regulation for designated investment alternatives that are not registered under the Securities Act of 1933 or the Investment Company Act of 1940?

A-25: Paragraph (d)(4)(i) of the regulation requires plan administrators to furnish specified investment-related information to participants and beneficiaries, either automatically at predetermined intervals or upon the request of a participant or beneficiary. With respect to designated investment alternatives that are registered under either the Securities Act of 1933 or the Investment Company Act of 1940, the plan administrator must furnish copies of prospectuses, or at its option, the plan administrator may instead furnish short-form or summary prospectuses. Copies furnished must be based on the latest information available to the plan administrator. Similar documents are required for all other designated investment alternatives under the plan.

Whether a document is "similar" to a prospectus, or a short-form or a summary prospectus, would depend on the particular facts and circumstances, including the type of designated investment alternative for which investment-related information must be disclosed. For example, in connection with a bank collective investment fund, a copy of the fund's "written plan" within the meaning of 12 CFR § 9.18(b)(1) or similar state law ordinarily would satisfy the requirements of paragraph (d)(4)(i) of the regulation. Alternatively, similar to short-form or summary prospectuses, bank fund fact sheets ordinarily may be used to satisfy this disclosure requirement, because they typically would contain information that corresponds to that contained in short-form or summary prospectuses.

The Department anticipates that, in most circumstances, one of the documents mentioned above already will exist and would satisfy these regulatory requirements. When such a document does not already exist, copies of the documents and other materials used by a plan fiduciary to prudently select and monitor the designated investment alternative ordinarily would satisfy the requirements of paragraph (d)(4)(i) of the regulation.

Form of Disclosure

Q-26: Must the disclosures required under the regulation be furnished as stand-alone documents?

A-26: No. While plan administrators have the discretion to furnish the required disclosures as stand-alone documents, they also have the discretion to furnish the required disclosures along with, or as part of, other documents. This discretion is evidenced in paragraph (e)(1) of the regulation, which specifically acknowledges that certain disclosures that must be made before the date on which a participant or beneficiary can first direct his or her investments may be furnished as part of the plan's summary plan description or a pension benefit statement. In this regard, paragraph (e)(1) merely recognizes various acceptable means of disclosure; it does not preclude other means for satisfying disclosure obligations under the final rule. *See* 75 FR 64922. Thus, for example, disclosures that must be made before the date on which a participant or beneficiary can first direct his or her investments may be furnished as part of a new employee's enrollment packet. Whatever the means for satisfying the disclosure obligations under the final rule, the disclosures must be furnished in compliance with the applicable timing requirements in the regulation.

Definitions

Designated Investment Alternatives; Brokerage Windows

Q-27: **A plan offers ten designated investment alternatives. The plan also designates a fiduciary investment manager, within the meaning of section 3(38) of ERISA, whom participants or beneficiaries may appoint to allocate the assets in their individual accounts among the plan's ten designated investment alternatives based on an investment strategy determined by the investment manager to be appropriate for that participant or beneficiary (*e.g.*, taking into account the participant's or beneficiary's age, time horizons, risk tolerance, current investments in designated investment alternatives or other assets, sources of income, and investment preferences). Is this investment management service a designated investment alternative under the regulation?**

A-27: No. Neither the service described above, nor each individual account it manages, is a "designated investment alternative" as described in 29 CFR § 2550.404a-5(h)(4). Thus, the investment-related disclosure requirements in 29 CFR § 2550.404a-5(d) would not apply to this investment service. However, the disclosure requirements in 29 CFR § 2550.404a-5(c)(1)(i)(E) and (c)(3) would apply. Consequently, the plan administrator must identify the designated investment manager, provide plan-level information regarding fees associated with the service, and provide participants and beneficiaries with a statement, at least quarterly, of the dollar amount of fees and expenses that actually were charged against their individual accounts, along with a description of the services to which the charges relate. Further, a plan fiduciary will be responsible for the prudent selection and monitoring of the designated investment manager, which is a provider of services to the plan, as described in paragraph (f) of the regulation. *See* also question 4.

Q-28: A plan offers ten designated investment alternatives. The plan also offers three model portfolios (labeled "conservative," "moderate," and "growth") made up of different combinations of the plan's designated investment alternatives. Is each model portfolio a designated investment alternative under the regulation?

A-28: A model portfolio ordinarily is not required to be treated as a designated investment alternative under the regulation if it is clearly presented to the participants and beneficiaries as merely a means of allocating account assets among specific designated investment alternatives. On the other hand, if, for example, in choosing a model portfolio, the plan participant acquires an equity security, unit participation, or similar interest in an entity that, itself, invests in some combination of the plan's designated investment alternatives, such model portfolio ordinarily would be a designated investment alternative. In either case, the plan administrator should clearly explain how the model portfolio functions. When a model portfolio is simply a means of allocating account assets among specific designated investment alternatives, the plan administrator also must clearly explain how it differs from the plan's designated investment alternatives. Finally, if a plan offers only model portfolios made up of investments not separately designated under the plan, each model would have to be treated as a designated investment alternative.

The Department understands that some plans and service providers currently are able to calculate and provide the information specified in paragraph (d) of the regulation with respect to model portfolios offered on recordkeeping platforms. While model portfolios ordinarily are not required to be treated as designated investment alternatives, the Department notes that plan administrators, pursuant to paragraph (d)(2)(ii), may include on the comparative chart additional information that the plan administrator determines to be appropriate as long as the information is not inaccurate or misleading. Thus, in cases similar to the facts described in this question, a plan administrator is permitted to treat such model portfolios as designated investment alternatives for purposes of the regulation, subject to the requirements in paragraph (d)(2)(ii) of the regulation and any other applicable limitations.[4]

Q-29: Does the regulation cover "brokerage windows"?

[4] *See also* the principles set forth in the Securities and Exchange Commission staff no-action letter, *Clover Capital Management Incorporated* (Oct. 28, 1986), concerning the use of investment results derived from model portfolios.

A-29: Yes. The regulation covers "brokerage windows," "self-directed brokerage accounts," and other similar plan arrangements that enable participants and beneficiaries to select investments beyond those designated by the plan. Coverage of brokerage windows under the regulation, however, is limited to the disclosure requirements in paragraph (c) of the regulation (relating to plan-related information). *See* question 13, above, as to the information that must be disclosed about a brokerage window. Pursuant to paragraph (h)(4) of the regulation, the disclosure requirements in paragraph (d) of the regulation (investment-related information) do not apply to brokerage windows, self-directed brokerage accounts, and similar arrangements, because such windows, accounts, and arrangements are not designated investment alternatives. Nor, for that matter, do the disclosure requirements in paragraph (d) of the regulation apply to any investment selected by a participant or beneficiary that is not designated by the plan (*i.e.*, any investments made through the window, account, or arrangement). *See also* question 39.

Q-30: *See* question 39.

Total Annual Operating Expenses

Q-31: The plan offers a fund-of-funds as a designated investment alternative. This fund ("acquiring fund") is an open-end management investment company registered under the Investment Company Act of 1940, as are all of the funds in which it invests ("acquired funds"). Must the acquiring fund's total annual operating expenses reflect the operating expenses of the acquired funds?

A-31: Yes. Acquired fund fees and expenses are included in the total annual operating expenses of an acquiring fund, which is disclosed in the prospectus of the acquiring fund filed with the Securities and Exchange Commission. Paragraph (h)(5)(i) of the regulation sets forth the method by which a registered designated investment alternative must calculate its total annual operating expenses. This paragraph, in relevant part, requires a plan administrator, or its designee, to calculate total annual operating expenses in accordance with the required Securities and Exchange Commission form, *i.e.*, Form N-1A (for open-end management investment companies). Instruction 3(f) to Item 3 of Form N-1A contains the methodology for acquiring funds to calculate their acquired fund fees and expenses (*see also* Securities and Exchange Commission Staff Responses to Questions Regarding Disclosure of Fund of Funds Expenses, available at http://www.sec.gov/divisions/investment/guidance/fundfundfaq.htm).

Under this methodology, the annual operating expenses of the acquiring fund must, in addition to its own annual operating expenses, proportionally reflect the annual operating expenses of the acquired funds.

For example, assume a registered open-end mutual fund that is a designated investment alternative (the acquiring fund) invests, evenly, in four underlying funds (the acquired funds) each of which also is an open-end mutual fund. The first acquired fund has annual operating expenses of .50%, the second and third 1.00%, and the fourth 1.50%. The annual operating expenses of the acquired funds would be 1.00% ((.25*.5) + (.50*1.0) + (.25*1.5)). The acquiring fund, itself, has annual operating expenses of .25% of average net assets. Accordingly, pursuant to paragraph (h)(5)(i) of the regulation, the total annual operating expenses of this designated investment alternative would be 1.25% of average net assets. This assumes that the acquiring fund's percentage investment in each underlying fund remains the same throughout the year.

Furthermore, as indicated in the preamble to the regulation, the purpose of paragraph (h)(5)(ii) is to achieve as much symmetry as possible between the calculation of the total annual operating expenses for registered and unregistered designated investment alternatives. *See* 75 FR 64924. Thus, principles similar to those expressed above apply to unregistered designated investment alternatives that invest in acquired funds or trusts. Accordingly, the total annual operating expenses for an unregistered designated investment alternative that is an acquiring fund (*e.g.*, a fund-of-funds or trust-of-trusts) should be calculated in the same manner.

Q-32: Pursuant to paragraph (h)(5)(ii) of the regulation, the total annual operating expenses calculation for designated investment alternatives that are not registered under the Investment Company Act of 1940 consists of the sum of certain specified fees and expenses for the alternative's most recently completed fiscal year, expressed as a percentage of the alternative's average net asset value for that year. How often must such alternatives calculate their net asset values in order to determine their average net asset value for the year?

A-32: The regulation does not explicitly specify how frequently these designated investment alternatives must determine their net asset values in order to calculate their total annual operating expenses in accordance with paragraph (d)(1)(iv)(2) of the regulation. However, as indicated in the preamble to the regulation, the purpose of paragraph (h)(5)(ii) was to achieve as much symmetry as possible between the calculation of the total annual operating expenses for registered and unregistered designated investment alternatives. *See* 75 FR 64924. The Department understands that designated investment alternatives that are registered under the Investment Company Act of 1940 must value their net assets at least monthly in order to calculate their average net assets for the year (Instruction 4 to Item 13 of Form N-1A). Accordingly, an unregistered designated investment alternative ordinarily would be in compliance with paragraph (h)(5)(ii) of the regulation if it calculated its net asset value not less frequently than monthly in order to determine the alternative's average net asset value for the year.

Q-33: One of a plan's designated investment alternatives is a separately managed trust account that invests solely in shares of a mutual fund that is registered under the Investment Company Act of 1940. When participants and beneficiaries invest in this alternative, they acquire units of the designated investment alternative, not shares in the mutual fund itself. Pursuant to the plan document, the plan administrator pays for some of the plan's general administrative expenses (legal, accounting, recordkeeping) by liquidating assets of the designated investment alternative. This method of paying plan administrative expenses reduces the value of each unit of the designated investment alternative, but has no impact on the number of units owned by participants and beneficiaries or on the share value of the underlying mutual fund. Is this designated investment alternative considered "registered" or "unregistered" for purposes of calculating its total annual operating expenses under paragraph (h)(5) of the regulation?

A-33: The designated investment alternative in this example is an unregistered alternative even though it invests solely in a mutual fund that itself is registered under the Investment Company Act of 1940. Accordingly, in calculating its total annual operating expenses, the plan administrator must follow the methodology in paragraph (h)(5)(ii) of the regulation, as contrasted with the methodology in paragraph (h)(5)(i) of the regulation. Thus, pursuant to paragraph (h)(5)(ii)(C) of the regulation, the plan's general administrative expenses mentioned above must be reflected in the designated investment alternative's total annual operating expenses. Further, because the plan's general administrative expenses are part of the designated investment alternative's total annual operating expenses, they also must be reflected in the designated investment alternative's average annual total return pursuant to paragraph (h)(3) of the regulation. Finally, because of how this plan pays for its general administrative expenses, the total annual operating expenses and average annual total return of the designated investment alternative will differ from the annual operating expenses and average annual total return of the mutual fund as reported in its prospectus. Plan administrators, therefore, should keep these discrepancies in mind as they discharge all of their disclosure obligations under the regulation, such as the Internet Web site address disclosures.

Q-34: A plan offers a stable value fund as one of its designated investment alternatives. The manager of the stable value fund purchases an insurance contract that is designed to smooth the rate of return of the alternative's underlying fixed income investments. The annual cost for this insurance is 20 basis points of the alternative's underlying investments. This fund expense is paid from the assets of the fund, which reduces the alternative's rate of return. In furnishing the investment-related information for this designated investment alternative, how should the cost of the insurance be disclosed under this regulation?

A-34: The cost of the insurance must be included in the total annual operating expenses of the designated investment alternative. Paragraph (h)(5) of the regulation defines total annual operating expenses by providing two calculations, one for registered and one for unregistered designated investment alternatives. These calculations are designed to capture the fees and expenses that reduce the alternative's rate of return. In this example, the cost of the insurance component is an expense that is paid by reducing an alternative's rate of return and so must be included in the total annual operating expense of the alternative.

<u>**Dates; Transitional Rules**</u>

Q-35: When must a plan administrator furnish the first initial disclosures, both plan-related and investment-related, required by the regulation?

A-35: A plan administrator must furnish the first initial disclosures (*i.e.*, the annual disclosures under paragraphs (c)(1), (c)(2)(i), (c)(3)(i) and (d)) to participants and beneficiaries no later than 60 days after July 1, 2012, the effective date of the Department's ERISA section 408(b)(2) fiduciary-level fee disclosure regulation, codified at 29 CFR § 2550.408b-2(c) (*see* 77 FR 5632), or, if later, 60 days after the first day of the first plan year that begins after November 1, 2011. Accordingly, for most plans, including calendar year plans, the first initial disclosures must be furnished to participants and beneficiaries no later than August 30, 2012.

Q-36: Pursuant to subparagraph (B) of the transitional rule (paragraph (j)(3)(i)), the disclosures required by paragraphs (c)(2)(ii) and (c)(3)(ii) of the regulation (*i.e.*, the quarterly statement of fees/expenses actually deducted) would have to be furnished no later than November 14, 2012 (for most plans, including calendar year plans), which is the 45th day after the end of the third quarter (July-September) in which the initial disclosure was required. Must this initial quarterly statement of fees and expenses actually deducted reflect the fees and expenses deducted prior to the third quarter?

A-36: No, the initial quarterly statement must reflect only the fees and expenses deducted for the calendar or plan-year quarter to which the statement relates. The regulation, at paragraphs (c)(2)(ii) and (c)(3)(ii), requires that, at least quarterly, participants and beneficiaries are furnished with the dollar amount of any fees and expenses actually deducted from their account along with a description of the services to which the charges relate. The regulation becomes applicable to individual account plans for plan years beginning on or after November 1, 2011. However, the regulation contains a transition rule (amended at 76 FR 42539) which provides that the initial quarterly disclosure must be furnished no later than 45 days after the end of the quarter in which the first set of initial disclosures (*i.e.*, disclosures under paragraphs (c)(1), (c)(2)(i), (c)(3)(i) and (d)) are required to be furnished. For example, for calendar year plans, the rule requires that the first quarterly disclosure must be furnished no later than 45 days after the end of the third quarter (or November 14, 2012), and that the quarterly disclosure only reflect the fees and expenses actually deducted during the third quarter.

Q-37: Pursuant to paragraph (j)(3) of 29 CFR § 2550.404a-5, a plan's initial annual disclosures under paragraphs (c) and (d) of the regulation are due no later than August 30, 2012. The plan administrator furnished these disclosures before the date of publication of this Field Assistance Bulletin. The furnished disclosures do not fully comport with the guidance set forth in this Bulletin. What is the Department's view on providing an additional extension or transition period for plan administrators who have or are about to furnish such disclosures?

A-37: The Department understands that many plan administrators and service providers concluded that they needed to start to implement changes to their recordkeeping, information management, and communication systems during 2010 and 2011 to ensure that they would be able to furnish plan fiduciaries, participants, and beneficiaries with the expanded disclosures required under the final fee-disclosure rules in a timely fashion. The Department also recognizes that, at this point in time, it may be difficult or costly for plan administrators and service providers to make further system adjustments in advance of the July 1, 2012 deadline for compliance with 29 CFR § 2550.408b-2(c) and the August 30, 2012 deadline for plan administrators to make the first initial disclosures to participants and beneficiaries under 29 CFR § 2550.404a-5.

Nonetheless, in light of the significance of these required disclosures and the already extended delay in the implementation of the regulations, the Department does not believe further broad-based extensions are appropriate. For enforcement purposes, however, the Department will take into account whether covered service providers and plan administrators have acted in good faith based on a reasonable interpretation of the new regulations. If they have acted in good faith based on a reasonable interpretation of the new regulations, enforcement actions generally would be unnecessary if the covered service provider or plan administrator, as applicable, also establishes a plan for complying with the requirements of this Bulletin in future disclosures.

Amendments to 29 CFR § 2550.404(c)-1

Q-38: A condition of compliance with the 404(c) regulation, as amended, is that a plan fiduciary must disclose the information required by the new participant-level disclosure regulation. Must the fiduciary of a 404(c) plan furnish the new disclosures by the applicability date of the participant-level disclosure regulation in order for the plan to retain its status as a 404(c) plan?

A-38: No. The final amendments to the 404(c) regulation require, in part, that participants and beneficiaries be furnished the information required pursuant to 29 CFR § 2550.404a-5 (the participant-level disclosure regulation). The fiduciary of a 404(c) plan does not have to furnish such information before it must be furnished under the participant-level disclosure regulation, taking into account the changes to the regulation's transition rules that were published in the Federal Register on July 19, 2011. *See* 76 FR 42539 and 77 FR 5632.

Mutual Fund Platforms and Brokerage Windows

Q-39: A plan offers an investment platform that includes a brokerage window, self-directed brokerage account, or similar plan arrangement. The fiduciary did not designate any of the funds on the platform or available through the brokerage window, self-directed brokerage account, or similar plan arrangement as "designated investment alternatives" under the plan. Is the platform or the brokerage window, self-directed brokerage account, or similar plan

arrangement a designated investment alternative for purposes of the regulation?

A-39. No. Whether an investment alternative is a "designated investment alternative" (DIA) for purposes of the regulation depends on whether it is specifically identified as available under the plan. The regulation does not require that a plan have a particular number of DIAs, and nothing in this Bulletin prohibits the use of a platform or a brokerage window, self-directed brokerage account, or similar plan arrangement in an individual account plan. The Bulletin also does not change the 404(c) regulation or the requirements for relief from fiduciary liability under section 404(c) of ERISA or address the application of ERISA's general fiduciary requirements to SEPs or SIMPLE IRA plans. Nonetheless, in the case of a 401(k) or other individual account plan covered under the regulation, a plan fiduciary's failure to designate investment alternatives, for example, to avoid investment disclosures under the regulation, raises questions under ERISA section 404(a)'s general statutory fiduciary duties of prudence and loyalty. Also, fiduciaries of such plans with platforms or brokerage windows, self-directed brokerage accounts, or similar plan arrangements that enable participants and beneficiaries to select investments beyond those designated by the plan are still bound by ERISA section 404(a)'s statutory duties of prudence and loyalty to participants and beneficiaries who use the platform or the brokerage window, self-directed brokerage account, or similar plan arrangement, including taking into account the nature and quality of services provided in connection with the platform or the brokerage window, self-directed brokerage account, or similar plan arrangement.

The Department understands plan fiduciaries and service providers may have questions regarding the situations in which fiduciaries may have duties under ERISA's general fiduciary standards apart from those in the regulation. The Department intends to engage in discussions with interested parties to help determine how best to assure compliance with these duties in a practical and cost effective manner, including, if appropriate, through amendments of relevant regulatory provisions.