

**FIELD ASSISTANCE BULLETIN NO. 2013-02**

DATE: July 22, 2013

MEMORANDUM FOR: MABEL CAPOLONGO, DIRECTOR OF ENFORCEMENT
REGIONAL DIRECTORS

FROM: JOHN J. CANARY
DIRECTOR OF REGULATIONS AND INTERPRETATIONS

SUBJECT: REQUIRED ANNUAL FEE DISCLOSURE
29 CFR § 2550.404a-5

Background

On October, 20, 2010, the Employee Benefits Security Administration (EBSA) published a final regulation on disclosure requirements for participant-directed individual account plans.¹ 29 CFR § 2550.404a-5. The regulation requires that plan administrators disclose detailed investment-related information to plan participants and beneficiaries about the plans' designated investment alternatives. Covered plans operating on a calendar-year basis had to furnish a comparative chart of the investment alternatives for the first time no later than August 30, 2012, and subsequently "at least annually thereafter[.]"² The regulation defines "at least annually thereafter" to mean at least once in any 12-month period, without regard to whether the plan operates on a calendar or fiscal year basis.³ For example, a plan administrator that furnished the first required chart on August 25, 2012, must furnish the next comparative chart no later than August 25, 2013. This timing requirement was intended to ensure that participants and beneficiaries receive consistent and regular information about their plan's investment alternatives.

Some plan administrators and service providers have expressed concern in recent months with this timing requirement. Specifically, they explain that an annual August deadline for the second comparative chart has no correlation to the timing of any other annual participant disclosures. Thus, they maintain that, although the regulation allows the comparative chart to be distributed along with other disclosures, it will have to be distributed in its own separate mailing. Aside from the cost savings, they contend that this important disclosure would be more likely to attract the attention of participants and beneficiaries if it was distributed at other times, such as at the end of the year during enrollment periods or with individual benefit statements.

¹ 75 FR 64910 (Oct. 20, 2010). The regulation was amended at 76 FR 42542 (July 19, 2011).

² 29 CFR §2550.404a-5(d)(1). Plans that do not operate on a calendar year must comply with the applicability date described in 29 CFR §2550.404a-5(j)(2), in which case the first comparative chart may not have been required by August 30, 2012. For the sake of simplicity, the illustrations in this Bulletin are based on a calendar year plan; the relief contained herein, however, applies to all plans.

³ 29 CFR §2550.404a-5(h)(1).

The parties believe that these considerations were not taken into account in establishing the deadline for the comparative chart. Instead, the deadline resulted from the fact that for most plans the first comparative chart had to be provided no later than 60 days after the July 1, 2012 effective date of the 408(b)(2) regulation, which requires that certain plan service providers disclose detailed service, fee, and investment-related information to plan fiduciaries.⁴

These plan administrators and service providers acknowledge that plan administrators are able to “re-set” the deadline for their next annual comparative chart under the regulation by furnishing two comparative charts within the same 12-month period (*e.g.*, a plan administrator who wants to send comparative charts out in January could have furnished the first chart on August 25, 2012, a second chart in January of 2013, and then “at least annually” in January thereafter). However, they argue that the cost of making two such disclosures in the same year could be substantial for some plans, and plan sponsors and plan fiduciaries are especially reluctant to re-set their disclosure deadline this way when such administrative cost would be borne by participants and beneficiaries.

For these reasons, many plan administrators and service providers have asked EBSA to provide plans with more flexibility so that the annual deadline for furnishing comparative charts can be aligned in a cost-effective manner with the furnishing of other participant notices and disclosures.

Temporary Enforcement Policy

In recognition of the foregoing transitional and other concerns, EBSA, as an enforcement matter, will treat a plan administrator as satisfying the “at least annually thereafter” requirement of the final regulation at 29 CFR § 2550.404a-5 if the plan administrator complies with the conditions in this Bulletin, below, and otherwise reasonably determines that doing so will benefit participants and beneficiaries.

A plan administrator may furnish the “2013 comparative chart” no later than 18 months after the prior comparative chart was furnished as described below. The “2013 comparative chart” is the comparative chart that is due, according to the terms of the final regulation, “at least annually” after the first comparative chart that was furnished in compliance with the regulation. For example, if a plan administrator furnished the first comparative chart on August 25, 2012, the “2013 comparative chart” would be due no later than August 25, 2013. In accordance with this Bulletin, however, the Department will take no enforcement action based on timeliness if the plan administrator furnishes the “2013 comparative chart” by February 25, 2014.

EBSA is aware that some plan administrators, in order to comply with the regulation, have already furnished their “2013 comparative chart.” Other plan administrators may already have incurred administrative costs and taken steps in order to furnish their 2013 comparative chart no later than August 30, 2013. These plan administrators, if they wish, may furnish the “2014 comparative chart” no later than 18 months after furnishing the prior comparative chart in compliance with the regulation. The “2014 comparative chart” is the comparative chart that is due, according to the terms of the regulation, “at least annually” after the second comparative chart that was furnished in compliance with the regulation. For example, if a plan administrator furnished the first comparative chart on August 25, 2012, and intends to furnish the second comparative chart on August 25, 2013, the “2014 comparative chart” would be due under the terms of the final regulation no later than August 25, 2014. In accordance with this Bulletin, however, the Department will take no enforcement action based on timeliness if the plan administrator furnishes the “2014

⁴ 29 CFR §2550.408b-2.

comparative chart” by February 25, 2015. This will afford these plan administrators the same opportunity for a one-time “re-set” of the timing for their annual comparative chart.

This Bulletin establishes a temporary enforcement policy until EBSA issues further guidance in this area. Under this policy, EBSA will not take any enforcement actions against a plan administrator who complies with the conditions in this Bulletin. The relief in this Bulletin is limited to the required annual disclosure of information under paragraphs (c) and (d)(1) and (2) of the regulation. The Bulletin does not relieve these plan administrators from other obligations under the regulation that are intended to ensure that participants and beneficiaries have access to updated investment-related information. For example, any changes to the plan’s investment instruction procedures or designated investment alternatives must be timely disclosed to participants and beneficiaries as required by the regulation.⁵ Further, the investment-related information that is made available at the required Internet Web site address must be updated in accordance with the regulation.⁶ Finally, this is an expression of EBSA’s enforcement policy but it does not address the rights or obligations of other parties.

Consideration of Regulatory Amendment

EBSA acknowledges that the one-time “re-set” permitted by this Bulletin does not address parties’ concerns that the current timing requirement may result in a fixed annual deadline for comparative charts. Accordingly, EBSA is considering whether to revise the regulation’s timing requirement to provide reasonable flexibility to plan administrators on a permanent basis. Specifically, EBSA is considering whether to allow a 30-day or 45-day window during which a subsequent annual comparative chart would have to be furnished, rather than fixing the 12-month “at least annually” period to end on one specific day. Parties wishing to express views on whether providing such a window of time would provide plan administrators with important flexibility and also preserve participants’ and beneficiaries’ receipt of regular and timely investment-related information concerning their plan’s investment alternatives can contact EBSA’s Office of Regulations and Interpretations. No inferences should be drawn that the guidance provided under this Bulletin will be reflected in changes, if any, to the final regulation.

Comments and questions concerning this Bulletin should be directed to Office of Regulations and Interpretations at 202.693.8510.

⁵ 29 CFR §2550.404a-5(c)(1)(i)(A) (relating to changes in investment instruction procedures), (c)(1)(i)(D) (relating to changes in the lineup of investment options), and (c)(1)(ii) (relating to the advance notice requirement of certain changes).

⁶ 29 CFR §2550.404a-5(d)(1)(v).