



September 18, 2013

The Honorable Phyllis Borzi
Assistant Secretary
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, NW
Room S-2524
Washington, D.C. 20210

RE: Fee Disclosures in Participant-Directed Individual Account Plans

Dear Assistant Secretary Borzi:

On behalf of The ERISA Industry Committee (“ERIC”), Plan Sponsor Council of America (“PSCA”), and the U.S. Chamber of Commerce (the “Chamber”), we are writing in response to the U.S. Department of Labor’s (the “Department”) request for comments on Field Assistance Bulletin 2013-02 (the “FAB”).

ERIC, PSCA and the Chamber applaud the Department for the issuing the FAB. The Department’s participant fee disclosure regulation¹ requires certain disclosures to be made for individual account plans (such as 401(k) plans) that allow participants and beneficiaries (collectively “participants”) to direct the investment of their accounts. While the body of the FAB references the “comparative chart,” we believe the FAB provides a one-time extension, for either 2013 or 2014, for plan administrators with respect to the delivery of all plan-related information described in paragraph (c) of the regulation and investment-related information described in paragraphs (d)(1) and (d)(2) (in effect, all annual notice requirements). We request that the Department confirm that the FAB’s relief applies to all of the regulation’s annual disclosures and not just the comparative chart.

The FAB also indicates that the Department is considering revising the regulation’s timing requirement to provide “reasonable flexibility” to plan administrators on a permanent basis. We strongly encourage the Department to adopt these measures.

INTEREST IN RETIREMENT PLANS

ERIC is a nonprofit association committed to the advancement of the employee retirement, health, incentive, and welfare benefit plans of America’s largest employers. ERIC’s

¹ 29 CFR §2550.404a-5.

members provide comprehensive retirement, health care coverage, incentive, and other economic security benefits directly to some 25 million active and retired workers and their families. ERIC has a strong interest in proposals affecting its members' ability to deliver those benefits, their costs and effectiveness, and the role of those benefits in the American economy.

PSCA is a nonprofit association that provides services, best practice information, and advocacy to defined contribution plan sponsors. Members have access to a broad range of resources and programs that address the varying needs of both small and large companies. Membership includes 1,000 companies ranging in size from Fortune 100 firms to small, entrepreneurial businesses.

The U.S. Chamber of Commerce is the world's largest business federation, representing more than three million businesses and organizations of every size, sector, and region. Besides representing a cross-section of the American business community in terms of number of employees, the Chamber represents a wide management spectrum by type of business and location. Each major classification of American business – manufacturing, retailing, services, construction, wholesaling, and finance – is represented. Also, the Chamber has substantial membership in all 50 states. Positions on national issues are developed by a cross-section of Chamber members serving on committees, subcommittees, and task forces. More than 1,000 business people participate in this process.

SUMMARY OF COMMENTS

ERIC, PSCA and the Chamber encourage the Department to:

- Confirm that the FAB's relief applies to all of the regulation's annual disclosures and not just the comparative chart;
- Confirm that plan administrators that delay the annual fee disclosures in accordance with the FAB continue to be entitled to rely on the fiduciary safe harbor included in the regulation;
- Extend the deadline for annual fee disclosures by providing a 45-day window as suggested by the Department; and
- Provide additional relief for special plan events.

DETAILED COMMENTS

The Department's participant fee disclosure regulation requires certain disclosures to be made for individual account plans (such as 401(k) plans) that allow participants and beneficiaries (collectively "participants") to direct the investment of their accounts. The FAB provides a one-time delay for employers with respect to the delivery of the comparative chart disclosure to participants for either 2013 or 2014. The FAB also indicates that the Department is considering revising the regulation's timing requirement to provide "reasonable flexibility" to plan administrators on a permanent basis.

I. The Department should confirm that the relief applies with respect to all of the regulation's required annual disclosures.

The FAB provides an extension for plans to furnish the “2013 comparative chart” or the “2014 comparative chart.” However, the regulation requires plan administrators to furnish participants, on an annual basis, with “plan-related information”, administrative expenses, individual expenses, and investment-related information² in addition to the “investment-related information” included in the comparative chart³.

ERIC, PSCA and the Chamber believe that the Department intended to provide the extension with respect to all of the information that is required to be furnished annually. However, it would be useful if the Department clarified its intent in order to avoid confusion among plan sponsors.

II. The Department should confirm that plan administrators who delay the annual fee disclosures continue to be entitled to rely on the fiduciary safe harbor.

The regulation states that in order to satisfy their duties under the Employee Retirement Income Security Act of 1974 (“ERISA”), plan administrators must ensure that participants are: (1) made aware of their rights and responsibilities with respect to the investment of their accounts; and (2) given sufficient information about the plan and its investments, including fee and expense information, to make informed decisions. The regulation provides a fiduciary safe harbor for satisfying these requirements.⁴

The FAB provides “enforcement relief” to plan administrators who take advantage of the one-time delay in the requirement to provide the annual disclosures. In particular, the FAB states that “this is an expression of EBSA’s enforcement policy but it does not address the rights or obligations of other parties.”

When considering additional changes to the regulation, we believe that the Department should provide fiduciary relief in addition to enforcement relief. For example, the Department could modify the definition of “at least annually thereafter” in the regulation to make clear that plan administrators who delay the 2013 or 2014 annual fee disclosures in accordance with the FAB continue to satisfy the requirement to furnish the information “at least annually” and, therefore, continue to be entitled to rely on the fiduciary safe harbor included in the regulations. In the meantime, ERIC, PSCA and the Chamber recommend that the Department issue sub-regulatory guidance that confirms that employers who take advantage of the one-time delay in providing participants with fee disclosure information under the FAB may continue to rely on the fiduciary safe harbor in the regulation.

² See 29 C.F.R. §2550.404a-5(c).

³ See 29 C.F.R. §2550.404a-5(d)(1) and (d)(2).

⁴ See 29 C.F.R. §2550.404a-5(b).

III. The deadline for annual fee disclosures should be extended by providing a 45-day window.

The regulation provides that the annual disclosures must be made at least once in any 12-month period. The Department noted in the FAB that it is considering providing a 30-day or 45-day window during which a subsequent annual comparative chart would need to be furnished.

ERIC, PSCA and the Chamber applaud the Department's suggestion and encourage the Department to provide a 45-day window for all annual disclosures. As the Department noted, plan administrators want to ensure that the disclosures are made near the annual deadline, but not so close to the deadline that they risk missing it. In addition, it is helpful for employers to have a flexible deadline in case they need to change the dates of their annual enrollment periods or other annual plan-related mailings. A 45-day window would provide them with the flexibility to timely provide the annual disclosures to participants without concern that they may miss the deadline.

IV. Additional relief should be provided for special plan events.

The Department should provide flexibility so that plans can change the timing of their annual notice in case of a special event. For example, a plan may switch from a fiscal year to a calendar year. In addition, as a result of a corporate merger or acquisition, plan administrators may need to combine retirement plans that operated with different year-ends. A plan could also switch to a different service provider who may regularly send out its disclosures a little later than the prior service provider. As the Department noted, it can be very expensive for plans to have to make additional disclosures in these circumstances. These costs, which may be passed through to participants, may not provide any corresponding benefit to participants.

Plans should be able to switch to an alternative deadline for its annual fee disclosures if: (1) there has been a special event; (2) the plan would benefit from a later deadline as a result of the special event; and (3) the new deadline would be no later than 18 months after the furnishing of the prior annual disclosures in compliance with the regulation. For example, assume a plan operates with a plan year ending on September 30th and has been sending out its annual fee disclosures by August 30th with its other annual materials. The plan then switches to a calendar year and would like to be able to send out its annual fee disclosures by November 30th with its other annual materials. The plan administrator should be able to elect to switch the plan's deadline for its annual fee disclosures from August 30th to November 30th.

ERIC, PSCA and the Chamber urge the Department to provide that a plan may provide the annual fee disclosures required by the regulation in the case of a special event as long as it would benefit the plan and the new deadline would be no later than 18 months after the plan last distributed the annual fee disclosures.

ERIC, PSCA and the Chamber appreciate the opportunity to provide comments on the FAB. If you have any questions concerning our comments, or if we can be of further assistance, please contact us as indicated below.

Sincerely,

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