

DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR Part 2550

RIN 1210-AB38

Target Date Disclosure

AGENCY: Employee Benefits Security Administration, Labor.

ACTION: Proposed regulation.

SUMMARY: The Department published in the Federal Register of October 24, 2007 a final regulation (the qualified default investment alternative regulation) providing relief from certain fiduciary responsibilities for fiduciaries of participant-directed individual account plans who, in the absence of directions from a participant, invest the participant's account in a qualified default investment alternative. On October 20, 2010, the Department published a final regulation that requires the disclosure of certain plan and investment-related information, including fee and expense information, to participants and beneficiaries in participant-directed individual account

plans (the participant-level disclosure regulation). This document contains proposed amendments to the qualified default investment alternative regulation to provide more specificity as to the information that must be disclosed in the required notice to participants and beneficiaries concerning investments in qualified default investment alternatives, including target date or similar investments. This document also contains a proposed amendment to the participant-level disclosure regulation that would require the disclosure of the same information concerning target date or similar investments to all participants and beneficiaries in participant-directed individual account plans.

DATES: Written comments on the proposed regulation should be received by the Department of Labor no later than [INSERT DATE THAT IS 45 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: To facilitate the receipt and processing of comments, EBSA encourages interested persons to submit their comments electronically to *e-ORI@dol.gov*, or by using the Federal eRulemaking portal *http://www.regulations.gov* (following instructions for submission of comments). Persons submitting comments electronically are encouraged not to submit paper copies. Persons interested in submitting comments on paper should send or deliver their comments (preferably three copies) to: Office of Regulations and Interpretations, Employee Benefits Security Administration, Room N-5655, U.S. Department of Labor, 200 Constitution Avenue, NW, Washington, DC 20210, Attention: Target Date Amendments. All comments will be available to the public, without charge, online at *http://www.regulations.gov* and *http://www.dol.gov/ebsa*, and at the Public Disclosure Room, Employee Benefits Security

Administration, U.S. Department of Labor, Room N-1513, 200 Constitution Avenue, NW,
Washington, DC 20210.

FOR FURTHER INFORMATION CONTACT: Kristen L. Zarenko, Office of Regulations and Interpretations, Employee Benefits Security Administration, (202) 693-8500. This is not a toll-free number.

SUPPLEMENTARY INFORMATION:

A. Background

Section 624(a) of the Pension Protection Act of 2006 (Pension Protection Act) added a new section 404(c)(5) to ERISA. Section 404(c)(5)(A) of ERISA provides that, for purposes of section 404(c)(1) of ERISA, a participant in an individual account plan shall be treated as exercising control over the assets in the account with respect to the amount of contributions and earnings which, in the absence of an investment election by the participant, are invested by the plan in accordance with regulations prescribed by the Secretary of Labor. On October 24, 2007, the Department of Labor (Department) published a final regulation implementing the provisions of section 404(c)(5) of ERISA.¹ Correcting amendments to the final regulation were published on April 30, 2008.² A fiduciary of a plan that complies with the final regulation, as amended, will not be liable for any loss, or by reason of any breach, that occurs as a result of investment in a qualified default investment alternative. The regulation describes the types of investments that

¹ 72 FR 60452 (Oct. 24, 2007).

² 73 FR 23349 (Apr. 30, 2008).

qualify as default investment alternatives under section 404(c)(5) of ERISA and the other requirements that must be satisfied in order for a fiduciary to obtain the relief from liability described above.

The final regulation provides that, in order for a fiduciary to obtain relief, participants and beneficiaries must receive information concerning the investments that may be made on their behalf. Specifically, paragraph (c)(3) of the final rule requires that participants and beneficiaries be furnished both an initial notice (generally thirty days in advance of a participant's eligibility to participate in the plan) and an annual notice for subsequent plan years. Paragraph (d) of the final rule sets forth the information that must be included in these notices. In addition to the notice requirement, paragraph (c)(4) of the final regulation required that fiduciaries provide certain investment-related information that must be disclosed under the Department's 404(c) regulation. Specifically, paragraph (c)(4) requires fiduciaries to provide to defaulted participants or beneficiaries the material described in sections 2550.404c-1(b)(2)(i)(B)(*l*)(*viii*) and (*ix*) and 2550.404c-1(b)(2)(i)(B)(*2*).

Since publication of the final rule, the Department has received many questions about the notice requirement, for example concerning the timing requirements for the notice and how much information must be disclosed concerning investment fees and expenses. The Department addressed these and other issues in a series of questions and answers concerning the final rule that was published in a Field Assistance Bulletin in April 2008.³ With respect to the disclosure of investment fee and expense information, the Department indicated at that time that it was developing a regulation to establish disclosure requirements for all participant-directed

³ See Field Assistance Bulletin No. 2008-03 (April 29, 2008).

individual account plans. The Department anticipated that furnishing the investment information required by such regulation, when finalized, would satisfy the investment-related fee and expense disclosures required by the qualified default investment alternative regulation. Nonetheless, the Department continues to receive requests for more formal guidance as to how the content requirements of the qualified default investment alternative notice may be satisfied. As discussed below, the Department proposes amending the qualified default investment alternative regulation to provide more specificity as to the information that must be disclosed.

In addition to questions about the notice requirement, recent attention has been paid to the increased use of “target date” or “lifecycle” funds and other similar investments (TDFs) as an investment alternative in participant-directed retirement plans, such as 401(k) plans.⁴ The Department’s final regulation included TDFs as one of the permissible categories of investment funds or products that may be used as a qualified default investment alternative, if all of the requirements of the final rule have been satisfied. The growing popularity of these products led to a focus in recent years on issues relating to the design, operation, and selection of TDFs for 401(k) plans, both as investment alternatives for plans generally and as qualified default investment alternatives for participants that do not provide investment direction. The designation of all investment alternatives, including TDFs, to be made available under a private sector retirement plan is governed by the fiduciary responsibility provisions of ERISA. Persons with this responsibility must prudently select and monitor investment alternatives, including alternatives intended to be qualified default investment alternatives.

⁴ Employee Benefits Research Institute Issue Brief #327, March 2009.

In 2008, the Department's ERISA Advisory Council studied several aspects of TDFs as 401(k) plan investment alternatives, including the challenges and risks they may pose to participants who invest in TDFs, the different types of TDFs, and appropriate criteria for selecting and monitoring TDFs. In its report to the Secretary of Labor, the Council recommended that the Department provide additional guidance to both plan fiduciaries and plan participants to enhance understanding of TDFs and the risks associated with TDF investing.⁵ In addition, there has been Congressional interest in target date fund issues.⁶ In June 2009, the Department and the Securities and Exchange Commission (Commission) held a joint public hearing to explore issues related to TDFs, including how they are managed at the investment level, how they are selected by plan fiduciaries and by investors, and how information about them is disclosed to plan participants and investors.

Following the public hearing and extensive review of the testimony presented and supplemental materials concerning TDFs, the Department was persuaded that both plan fiduciaries and plan participants would benefit from additional guidance concerning TDFs. Accordingly, the Department and the Commission recently published a joint Investor Bulletin to better educate investors and plan participants who are considering investing in TDFs.⁷ The Commission also recently proposed rules to address concerns regarding the potential for investor misunderstandings about TDFs.⁸ The Department further intends to publish a series of tips

⁵ See 2008 ERISA Advisory Council Working Group Report on Hard to Value Assets and Target Date Funds, found at: <http://www.dol.gov/ebsa/publications/2008ACreport1.html>.

⁶ See <http://aging.senate.gov/record.cfm?id=308665&&>; http://aging.senate.gov/hearing_detail.cfm?id=309027& and http://aging.senate.gov/hearing_detail.cfm?id=319426&.

⁷ The Investor Bulletin, published May 6, 2010, is available at: <http://www.dol.gov/ebsa/pdf/TDFInvestorBulletin.pdf>.

⁸ Commission Release Nos. 33-9126, 34-62300, IC-29301, at <http://www.sec.gov/comments/s7-12-10/s71210.shtml>.

intended to assist plan fiduciaries in obtaining and evaluating relevant information when selecting and monitoring TDFs as investment options for participant-directed retirement plans.

The Department also determined that improvements can be made in the information that is disclosed to participants and beneficiaries concerning their plan investment in TDFs, whether by their own investment direction or pursuant to the qualified default investment alternative regulation. To ensure that consistent information concerning TDFs is furnished to defaulted participants and to participants who give investment directions, the Department is publishing in this Notice proposed amendments to both the qualified default investment alternative regulation and the participant-level disclosure regulation. The amendment to the participant-level disclosure regulation, at § 2550.404a-5 (75 FR 64910, October 20, 2010), will be included in paragraph (i)(4) of that regulation, which was reserved for this purpose. More detailed information about the participant-level disclosure regulation, including the general investment-related disclosure requirements, can be found in the Supplementary Information for that regulation.

B. Description of Amendments

This proposal amends paragraphs (c)(4) and (d)(3), (4), and (5) of the qualified default investment alternative regulation to more specifically describe certain investment-related information that must be included in the required notice to participants and beneficiaries. This information is intended to complement the new investment-related disclosure requirements contained in the participant-level disclosure regulation.

Paragraph (c)(4) of the rule is being revised to reflect amendments to the Department's 404(c) regulation that were made as part of the participant-level disclosure regulation. Rather than referring to requirements previously contained in the 404(c) regulation, this paragraph of the qualified default investment alternative regulation now requires fiduciaries to provide the comparable materials that are described in section 2550.404a-5(d)(3) and (4) of the participant-level disclosure regulation.⁹

Paragraph (d)(3) of the rule requires that the notice include: “[a] description of the qualified default investment alternative, including a description of the investment objectives, risk and return characteristics (if applicable), and fees and expenses attendant to the investment alternative[.]”¹⁰ To ensure that plan fiduciaries understand the specific investment information that must be disclosed to defaulted participants and beneficiaries about qualified default investment alternatives, and to better conform these requirements to those of all participant-directed individual account plans pursuant to the Department's participant-level disclosure regulation, proposed paragraph (d)(3) contains six separate elements. The description of the

⁹ Consistent with the participant-level disclosure regulation, the material required by section 2550.404a-5(d)(4), which is referred to in paragraph (c)(4) of this amendment, must be furnished upon request.

¹⁰ § 2550.404(c)-5(d)(3).

qualified default investment alternative must first include the name of the investment's issuer. Second, the description must include the investment's objectives or goals. Third, the description must include the investment's principal strategies (including a general description of the types of assets held by the investment), and principal risks (e.g., as required by Securities and Exchange Commission Form N-1A). Fourth, the description must include the investment's historical performance data (e.g., 1-, 5-, and 10-year returns) and, if applicable, any fixed return, annuity, guarantee, death benefit, or other ancillary features; as well as a statement indicating that an investment's past performance is not necessarily an indication of how the investment will perform in the future. Fifth, the description must include the investment's attendant fees and expenses, including: any fees charged directly against the amount invested in connection with acquisition, sale, transfer of, or withdrawal (e.g., sales loads, sales charges, deferred sales charges, redemption fees, surrender charges, exchange fees, account fees, and purchase fees); any annual operating expenses (e.g., expense ratio); and any ongoing expenses in addition to annual operating expenses (e.g., mortality and expense fees). For purposes of these requirements to disclose an investment's objectives or goals, principal strategies and principal risks, historical performance, and fees and expenses, the Department requests comment on the extent to which these requirements should conform to the final participant-level disclosure regulation; for example, should the more specific standards for investment-related information contained in the participant-level disclosure regulation be incorporated by reference into the qualified default investment alternative regulation? The Department believes that conforming the requirements will make it easier for plan fiduciaries and administrators to comply and help to avoid confusion among participants and beneficiaries who will receive the required disclosures.

The sixth requirement will ensure that participants and beneficiaries obtain comprehensive information about TDFs that apply age or target retirement-based asset allocations, described in paragraph (e)(4)(i) of the qualified default investment alternative regulation. Specifically, to the extent the information is not already disclosed pursuant to the preceding requirements of paragraph (d)(3) of the rule, the description must satisfy three requirements. The first is an explanation of the asset allocation, how the asset allocation will change over time, and the point in time when the investment will reach its most conservative asset allocation, including a chart, table, or other graphical representation that illustrates such change in asset allocation over time and that does not obscure or impede a participant's or beneficiary's understanding of the information explained pursuant to this requirement. The Department understands that many investment issuers and service providers already include simple and straight-forward graphs, pie chart series, or other illustrations to assist investors by showing them how asset allocations in TDFs change over time. To the extent such illustrations are not already furnished to participants and beneficiaries, the Department is persuaded that any additional burden associated with preparation of a compliant illustration will prove highly beneficial to enhance participants' and beneficiaries' understanding of a TDF's asset allocation and how it will change over time.

The second requirement depends on whether the alternative is named, or otherwise described, with reference to a particular date (e.g., a target date). For example, many funds include a target retirement date in the name itself (e.g., a "2030 fund" or a "2040 fund"). In some cases the name of the alternative may not include a date, but a retirement or other target date may be referenced or implied in the description of the alternative's objectives or goals, or

principal strategies or principal risks; this requirement applies to those alternatives as well. The notice must explain the age group for whom the investment is designed, the relevance of the date, and any assumptions about a participant's or beneficiary's contribution and withdrawal intentions on or after such date. The third requirement is a statement that the participant or beneficiary may lose money by investing in the qualified default investment alternative, including losses near and following retirement, and that there is no guarantee that investment in the qualified default investment alternative will provide adequate retirement income. All of the information required to be disclosed concerning TDFs and similar products is consistent with the analysis discussed in the Department's recent guidance to plan participants and expected guidance to plan fiduciaries concerning the factors that must be taken into account when selecting and monitoring, or investing in, these products. The Department is interested in comments as to whether, and to what extent, the final rule should include disclosure elements or concepts contained in the Commission's rulemaking.¹¹

To ensure that *all* participants and beneficiaries in participant-directed individual account plans, not only participant and beneficiaries who are invested in a qualified default investment alternative, receive the same information about TDFs, the Department also is proposing in this Notice to include the same three disclosure requirements concerning TDFs in the participant-level disclosure regulation. Specifically, these new requirements, if adopted, will be added to paragraph § 2550.404a-5(i)(4) of the participant-level disclosure regulation, which was reserved for this purpose. To ensure consistency between these regulations, the Department expects that any changes made to the TDF disclosure requirements in response to comments on this Notice

¹¹ See footnote 8, above.

will be reflected in both the qualified default investment alternative regulation and the participant-level disclosure regulation.

Paragraph (d)(4) of the qualified default investment alternative regulation requires that the notice to participants contain a “description of the right of the participants and beneficiaries on whose behalf assets are invested in a qualified default investment alternative to direct the investment of those assets to any other investment alternative under the plan, including a description of any applicable restrictions, fees or expenses in connection with such transfer[.]”¹² In the proposal published today, this paragraph has been modified. If any such fees or restrictions are applicable, this paragraph would only require a statement that certain fees and limitations may apply in connection with such transfer. The requirement to disclose the fees and expenses themselves would be moved to paragraph (d)(3)(v), discussed above; if other limitations may apply, the notice must so state.

Finally, paragraph (d)(5) of the qualified default investment alternative regulation would be broadened to clarify that comprehensive information about the qualified default investment alternative, as well as the other investment alternatives available under the plan, is available to participants and beneficiaries. Currently, paragraph (d)(5) only requires “[a]n explanation of where the participants and beneficiaries can obtain investment information concerning *the other* investment alternatives available under the plan.”¹³ As amended by this proposal, this paragraph requires an explanation of where the participants and beneficiaries can obtain additional investment information concerning *the qualified default investment alternative and the other*

¹² § 2550.404(c)-5(d)(4).

¹³ § 2550.404(c)-5(d)(5).

investment alternatives available under the plan. The Department included this modification to conform to the participant-level disclosure regulation. Specifically, the Department expects that paragraph (d)(5), if adopted in final form, will ensure that defaulted participants and beneficiaries know where to obtain any additional investment information required to be disclosed pursuant to the final participant-level disclosure regulation concerning all of the plan's investment alternatives, including qualified default investment alternatives.

C. Furnishing Required Disclosures

In conjunction with the adoption of the final participant –level disclosure regulation, § 2550.404a-5 (75 FR 64910, October 20, 2010), the Department explained in the Supplementary Information that, given the differing views on the use of and standards for electronic disclosure, it would be undertaking a review of the safe harbor applicable to the use of electronic media for furnishing information to plan participants and beneficiaries (29 CFR § 2520.104b-1(c)). The Department further indicated that, in the very near future, it will be publishing a Federal Register notice requesting public comments, views, and data relating to the electronic distribution of plan information to plan participants and beneficiaries. The Department also noted that, pending the completion of its review and the issuance of further guidance, the general disclosure regulation at 29 CFR § 2520.104b-1 applies to material furnished under the participant-level disclosure regulation, including the safe harbor for electronic disclosures at paragraph (c) of the general disclosure regulation. The Department anticipates that resolution of the issues involved with the electronic disclosure of plan information will directly affect the manner in which materials required by the amendments contained in this notice may be furnished to participants and

beneficiaries. Accordingly, interested persons are encouraged to participate in the Department's forthcoming solicitation of comments on the use of electronic media for furnishing plan information.

D. Effective Date

The Department proposes that the amendments to regulation sections 2550.404a-5 and 2550.404c-5 contained in this notice will be effective 90 days after publication of the final rule in the **Federal Register**. The Department invites comment on whether the final rule should be effective on a different date.

E. Regulatory Impact Analysis

Executive Order 12866 Statement

Under Executive Order 12866, the Department must determine whether a regulatory action is "significant" and therefore subject to the requirements of the Executive Order and subject to review by the Office of Management and Budget (OMB). Under section 3(f) of the Executive Order, a "significant regulatory action" is an action that is likely to result in a rule (1) having an effect on the economy of \$100 million or more in any one year, or adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities (also referred to as "economically significant"); (2) creating serious inconsistency or otherwise interfering with an

action taken or planned by another agency; (3) materially altering the budgetary impacts of entitlement grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raising novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order. Although the Department believes that this regulatory action is not economically significant within the meaning of section 3(f)(1) of the Executive Order, the action has been determined to be significant within the meaning of section 3(f)(4) of the Executive Order, and accordingly, OMB has reviewed this notice of proposed rulemaking pursuant to the Executive Order. The Department provides the following assessment of the potential costs and benefits associated with the proposed regulation below.

Need for Regulatory Action

As discussed earlier in this preamble, on October 24, 2007, the Department published a final regulation implementing the provisions of section 404(c)(5) of ERISA.¹⁴ A fiduciary of a plan that complies with the final regulation, as amended, will not be liable for any loss, or by reason of any breach, that is the direct and necessary result of investing all or a part of a participant's or beneficiary's account in a qualified default investment alternative. As noted in the regulation, this relief does not apply to fiduciary duties or liability related to the selection or monitoring of particular qualified default investment alternatives. The regulation describes the types of investments that qualify as default investment alternatives under section 404(c)(5) of ERISA and the other requirements that must be satisfied in order for a fiduciary to obtain the relief from liability described above.

¹⁴ 72 FR 60452 (Oct. 24, 2007). Correcting amendments to the final regulation were published on April 30, 2008 (73 FR 23349).

As discussed earlier, the Department's final qualified default investment alternative regulation includes TDFs as one of the permissible categories of investment funds or products that may be used as a qualified default investment alternative, if all of the requirements of the final rule have been satisfied. Since the issuance of the Department's final qualified default investment alternative regulation, plans have increased their use of TDFs as an investment alternative.¹⁵ At the end of the first quarter of 2009, the amount of employer sponsored defined contribution plan assets invested in TDFs totaled \$145 billion, compared to \$37 billion in 2003.¹⁶ A recent survey found that nearly 60 percent of plans have made TDFs the qualified default investment alternative for participants that do not provide investment direction and nearly 60 percent of participant-directed individual account plans, such as 401(k) plans, offer TDFs as an investment alternative.¹⁷

The financial market downturn that started in 2008 increased volatility and lowered returns of TDFs.¹⁸ Many TDFs designed for people recently nearing or entering retirement suffered large losses. For example, on average, participants invested in TDFs dated 2010 and 2015 lost about a quarter of their value in 2008. Many of these funds typically held about half of the holdings in stocks, following glide paths that did not significantly reduce that percentage for

¹⁵ Donahue, Andrew. Testimony Concerning Target Date Funds. *Before the United States Senate Special Committee on Aging*. October 28, 2009.

¹⁶ Borzi, Phyllis. Testimony of Phyllis C. Borzi. *Before the United States Senate Special Committee on Aging*. October 28, 2009.

¹⁷ Profit Sharing/401k Council of America, 52nd Annual Survey of Profit Sharing and 401(k) plans, for plan year 2008.

¹⁸ Deloitte Financial Advisory Services LLP, *Target Date Funds: Historical Volatility/Return Profiles*, unpublished presentation to the U.S. Department of Labor, Employee Benefits Security Administration (Sept. 30, 2009). In particular, the research found that the 1-year volatility was generally greater than the 3-year volatility and the 1-year returns were lower than the 3-year returns. Deloitte also found that funds with target date 2010 were more volatile in 2008 than they were in 2007. In addition, Deloitte reports that volatility among 2010 TDFs correlated with the fraction of the funds that are invested in stock and small 2010 funds are more heterogeneous in rates of return and in volatility than large funds.

5 years or more after the average investor retired.¹⁹ The Background discussion, above, summarizes responses to this development, for example from the U.S. Senate Special Committee on Aging, and activities undertaken by the Department and the Securities and Exchange Commission since then.

Experts within the investment community agree that TDF disclosures to participants and beneficiaries need to be improved. For example, the Investment Company Institute (ICI) Target Date Fund Disclosure Working Group reviewed existing TDF disclosures and in a June 2009 Report, recommended that TDFs display prominently five key pieces of information to help enhance investors' understanding such as the relevance of the target date used in a fund's name, the assumptions the fund makes regarding the investor's withdrawal intentions at and after the target date, the age group for whom the fund is designed, an illustration of the glide path that the TDF follows to reduce its equity exposure and become more conservative over time, and a statement that the risks associated with a TDF include the risk of loss near, at, or after the target date and that there is no guarantee that the fund will provide adequate income at and through the investor's retirement.²⁰

¹⁹ Borzi, Phyllis. Testimony of Phyllis C. Borzi. Before the United States Senate Special Committee on Aging. October 28, 2009.

²⁰See *e.g.* Principles to Enhance Understanding of Target Date Funds: Recommended by the ICI Target Date Fund Disclosure Working Group. June 18, 2009. http://www.ici.org/pdf/ppr_09_principles.pdf

In order to address some of the deficiencies in communication relating to TDFs, the Investment Company Institute made a series of recommendations for disclosure, many of which overlap with the requirements contained in these proposed regulation. See *e.g.* Charlson, Josh et. al. Target Date Series Research Paper: 2010 Industry Survey, *Morningstar*, 2010. http://corporate.morningstar.com/US/documents/MethodologyDocuments/MethodologyPapers/TargetDateFundSurvey_2010.pdf

Based on the foregoing, the Department is proposing to amend its final qualified default investment alternative and participant-level disclosure regulations to improve the information that is disclosed to participants and beneficiaries regarding TDFs.

Affected Entities

Based on the latest available information, the Department estimates that there are approximately 483,000 participant-directed individual account plans.²¹ The Department's proposed amendment to its final qualified default investment alternative rule would affect the approximately 114,000 participant-directed individual account plans that use TDFs as their qualified default investment alternative and the proposed amendment to its participant-level disclosure final rule would affect 278,000 participant-directed individual account plans that offer TDFs as an investment alternative.²² The Department also estimates that 43.6 million participants and beneficiaries are covered by plans using TDFs as an investment alternative.

Benefits

The Department expects that the enhanced disclosures required by the proposed regulation would benefit participants and beneficiaries by providing them with critical information they need to evaluate the quality of TDFs and how specific TDFs match their risk

²¹ Based on 2007 Form 5500 filings.

²² The Department's estimate is based on the Profit Sharing/401k Council of America, 52nd Annual Survey of Profit Sharing and 401(k) plans, for plan year 2008. This survey finds that 57.7 percent of participant-directed individual account plans offer TDFs as an investment option (483,000 * .577 = 278,691). It also finds that 39.6 percent of participant-directed individual account plans have automatic enrollment and that 59.7 percent of those plans use TDFs as the QDIA (483,000 * .396 * .597 = 114,187).

profile. This should lead to improved investment results and retirement planning decisions. The TDF disclosures would foster a better understanding of how TDFs operate and the glide path that is associated with each fund. The Department believes that the disclosures under this proposed regulation, combined with the greater transparency required by the Department's participant-level disclosure regulation, would allow participants and beneficiaries to determine whether the efficient way in which TDFs allow them to invest in a mix of asset classes and rebalance their asset allocation periodically is worth the price differential they generally pay for such funds.²³

Although the Department is unable to quantify the benefits associated with the proposed regulation, it is confident that the benefits justify their costs.

Costs

The Department estimates that the proposed regulation would result in 66.2 million TDF disclosures being distributed. The associated total hour burden for affected plans is estimated to be 29,000 hours with an equivalent cost of \$1.8 million annually. The estimated cost burden for plans to distribute the notices is \$4.1 million annually. Because these costs are associated with information collection requests covered by the Paperwork Reduction Act, the data and methodology used in developing the cost estimates are more fully discussed in the Paperwork Reduction Act section, below.

²³ Collins, Margaret. Target-Date Funds May Miss Mark for Unsavvy Savers. Bloomberg <http://www.bloomberg.com/apps/news?pid=20603037&sid=aSGY6tmw7IXs>. The author finds that the median fee for TDFs is approximately .85 (depending on the age of the saver). However, some expense ratios are as low as .19 percent, while others are as high as 1.50 percent.

Paperwork Reduction Act

As part of its continuing effort to reduce paperwork and respondent burden, the Department of Labor conducts a preclearance consultation program to provide the general public and federal agencies with an opportunity to comment on proposed and continuing collections of information in accordance with the Paperwork Reduction Act of 1995 (PRA 95) (44 U.S.C. 3506(c)(2)(A)). This helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed.

Currently, EBSA is soliciting comments concerning the information collection request (ICR) included in the Proposed Rule on the Fiduciary Requirements for Disclosure and Default Investment Alternatives Under Participant Directed Individual Account Plans. A copy of the ICR may be obtained by contacting the PRA addressee shown below.

The Department has submitted a copy of the proposed rule to OMB in accordance with 44 U.S.C. 3507(d) for review of its information collections. The Department and OMB are particularly interested in comments that:

- Evaluate whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility;

- Evaluate the accuracy of the agency's estimate of the burden of the collection of information, including the validity of the methodology and assumptions used;
- Enhance the quality, utility, and clarity of the information to be collected; and
- Minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses.

Comments should be sent to the Office of Information and Regulatory Affairs, Office of Management and Budget, Room 10235, New Executive Office Building, Washington, DC 20503; Attention: Desk Officer for the Employee Benefits Security Administration. OMB requests that comments be received within 30 days of publication of the proposed rule to ensure their consideration.

PRA Addressee: Address requests for copies of the ICR to G. Christopher Cosby, Office of Policy and Research, U.S. Department of Labor, Employee Benefits Security Administration, 200 Constitution Avenue, NW., Room N-5718, Washington, DC 20210.

Telephone (202) 693-8410; Fax: (202) 219-5333. These are not toll-free numbers. ICRs submitted to OMB also are available at <http://www.RegInfo.gov>.

(a) Proposed Amendment to Qualified Default Investment Alternative Regulation

Under the proposed amendment to paragraph (d)(3) of the Department's qualified default investment alternative regulation, the notice provided to participants and beneficiaries that use TDFs as a qualified default investment alternative (the QDIA notice) would be required to contain comprehensive information about TDFs. This information is described in detail earlier in this preamble, along with other changes to the information required to be disclosed in the QDIA notice that do not relate specifically to TDFs.

The Department understands that many investment issuers and service providers currently furnish straight-forward graphs, pie chart series, and other illustrations to demonstrate to investors how asset allocations in TDFs change over time and other information that would be required to be disclosed in the QDIA notice by the proposed regulation. Therefore, the burden that would be imposed by this proposed regulation stems primarily from incorporating the more comprehensive TDF disclosure into the QDIA notice. The Department invites comments regarding this assumption.

The Department believes that a financial professional should be able to incorporate the TDF disclosures into the QDIA notice, on average, in approximately 15 minutes at a labor rate of approximately \$63 per hour.²⁴ The Department estimates that the hour burden imposed on the approximately 114,000 affected plans would be 28,520 hours (114,079 plans*0.25 hours) with an equivalent cost of \$1.79 million (114,079 plans*.25 hours per plan*\$62.81/hour).

²⁴ EBSA estimates of labor rates include wages, other benefits, and overhead based on the National Occupational Employment Survey (May 2008, Bureau of Labor Statistics) and the Employment Cost Index June 2009, Bureau of Labor Statistics).

The Department estimates that the disclosure would add two pages to the QDIA notice, and that an estimated 18.4 million participants would be required to receive the disclosures.²⁵ The Department expects that 38 percent of participants would receive the disclosure by electronic means, leaving an estimated 11.4 million paper disclosures that would be sent via mail. The Department estimates that 6.8 percent of participants are new to a plan²⁶ in a given year; therefore, 780,000²⁷ participants generally would be required to receive the QDIA notice at least 30 days in advance of the date of plan eligibility. No mailing costs are included in the cost estimates, because the TDF disclosure would be incorporated into the QDIA notice. In total, 12.2 million paper disclosures would be required. Assuming paper costs of \$.05 per page, the Department estimates that the cost burden associated with this proposed regulation's amendment to the QDIA notice would be \$1.2 million.

(b) Proposed Amendment to Participant-Level Disclosure Regulation

The proposed amendment to the Department's participant-level disclosure regulation would require participant-directed individual account plans that offer TDFs as a designated investment alternative to include the TDF disclosures as an appendix to the participant-level disclosures required by 29 CFR 2550.404a-5 (d)(1) and (d)(2).

²⁵ The Department estimate of 18.4 million participants is derived as follows: 76.6 percent of eligible workers participate in employer-sponsored pension plans. Based on 2007 Form 5500 data, the Department estimates that 59.6 million individuals are active participants in participant-directed individual account plans. Using those two numbers, the Department estimates that 77.8 million workers are eligible to participate in participant-directed individual account plans ($77.8 \text{ million} * .766 = 59.6 \text{ million}$). The Department estimates that 39.6 percent of plans have automatic enrollment, and 59.7 percent of these plans use TDFs as their QDIA ($77.8 \text{ million} * .396 * .597 = 18.4 \text{ million}$).

²⁶ These individuals receive the QDIA notice twice in their first year of participation: Once when they are eligible to participate in the plan and once when all participants receive the plan's annual QDIA notice.

²⁷ $18.4 \text{ million} * .062 * .068 = .78 \text{ million}$ (rounded).

The Department assumes that plans would incur a de minimis cost to prepare the appendix, because, as stated above, investment issuers and service providers already have the TDF information readily available to provide to plans. No additional mailing costs are expected, because the TDF disclosures would be attached as an appendix to, and distributed with, the participant-level disclosure. Thus, the only anticipated additional costs would pertain to the additional paper costs associated with including the additional TDF appendix with the participant-level disclosure.

The TDF appendix is expected, on average, to add two pages to the participant-level disclosure. As discussed above, the Department estimates that 43.6 million participants are covered by participant-directed individual account plans that offer TDFs as an investment alternative.²⁸ The Department estimates that 6.8 percent of participants are new to a plan in a given year; therefore, 2.96 million additional disclosures would be required²⁹ resulting in a total of 46.5 million TDF fund appendices being distributed annually. The Department estimates that 38 percent of the disclosures would be distributed electronically at a de minimis cost, leaving 28.8 million paper disclosures to be distributed via mail. Assuming paper costs of \$0.10 per participant (\$.05 per page), the proposed amendment to the participant-level disclosure regulation would impose an additional cost of approximately \$2.9 million to the participant-level disclosure.

(c) Summary

²⁸ The Department's estimate is based on the Profit Sharing/401(k) Council of America, 52nd Annual Survey of Profit Sharing and 401(k) plans, for plan year 2008.

²⁹ 43.6 million*.068=2.96 million.

Overall, the proposed amendments to the qualified default investment alternative and participant-level disclosure regulations would result in approximately 66.2 million TDF disclosures being distributed. The total hour burden associated with the additional disclosures would be an estimated 29,000 hours with an equivalent cost of \$1.8 million (all allocated to the qualified default investment alternative regulation). The Department estimates that the total cost burden for the disclosures would be \$4.1 million (\$1,217,000 (qualified default investment alternative); \$2,884,000 (participant-level disclosure)).

These paperwork burden estimates are summarized as follows:

Type of Review: Revised collections.

Agency: Employee Benefits Security Administration, Department of Labor.

Title: Default Investment Alternatives Under Participant Directed Individual Account Plans (QDIA Regulation Amendment) and Fiduciary Requirements for Disclosure in Participant-Directed Individual Account Plans (Participant-Level Disclosure Regulation Amendment).

OMB Control Number: 1210-0132; 1210-0090.

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

Respondents: 114,000 (QDIA Regulation Amendment); 278,000 (Participant-Level Disclosure Amendment).

Responses: 66,157,539 (19,636,964 QDIA Regulation Amendment; 46,520,575 Participant-Level Disclosure Regulation Amendment).

Frequency of Response: Annually.

Estimated Total Annual Burden Hours: 29,000 hours (first year and subsequent years; all allocated to QDIA Regulation Amendment).

Estimated Total Annual Burden Cost: \$4,102,000 (first year and subsequent years); \$1,217,500 (QDIA Regulation Amendment); \$2,884,500 (Participant-Level Disclosure Regulation Amendment).

Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) (RFA) imposes certain requirements with respect to Federal rules that are subject to the notice and comment requirements of section 553(b) of the Administrative Procedure Act (5 U.S.C. 551 *et seq.*) and which are likely to have a significant economic impact on a substantial number of small entities. Unless the head of an agency certifies that a proposed rule is not likely to have a significant economic impact on a substantial number of small entities, section 603 of the RFA requires that the agency present an initial regulatory flexibility analysis at the time of the publication of the notice of proposed rulemaking describing the impact of the rule on small entities and seeking public comment on such impact.

For purposes of the RFA, the Department continues to consider a small entity to be an employee benefit plan with fewer than 100 participants.³⁰ Further, while some large employers may have small plans, in general small employers maintain most small plans. Thus, the Department believes that assessing the impact of this proposed rule on small plans is an appropriate substitute for evaluating the effect on small entities. The definition of small entity considered appropriate for this purpose differs, however, from a definition of small business that

³⁰ The basis for this definition is found in section 104(a)(2) of the Act, which permits the Secretary of Labor to prescribe simplified annual reports for pension plans that cover fewer than 100 participants..

is based on size standards promulgated by the Small Business Administration (SBA) (13 CFR 121.201) pursuant to the Small Business Act (15 U.S.C. 631 et seq.). The Department therefore requests comments on the appropriateness of the size standard used in evaluating the impact of this proposed rule on small entities.

The Department certifies, as required by the RFA, that while the proposed regulation would impact a substantial number of small entities, the economic impact of the proposed rule would not be significant. The Department estimates that the cost per plan to prepare the notice would be less than \$20, because much of the required information is expected to be readily available from service providers. Moreover, the anticipated cost per participant for plans to send the qualified default investment alternative and participant-level fee TDF disclosures are estimated to be \$0.20 annually.

Based on industry survey data, the Department believes that small plans would be less likely to be affected by this regulation, because while small plans are slightly more likely to be participant-directed, they are less likely to default participants into TDFs or provide access to such funds as an investment alternative. The survey showed that 56.3 percent of plans with 5,000 or more participants have automatic enrollment compared to just 15.8 percent of plans with 1-49 participants, and that while 64 percent of participant-directed plans with more than 5,000 participants offer TDFs as an investment option, only 47.9 percent of such plans with 1-49 participants offer TDFs as an investment option.³¹ The burden that would be imposed by the proposed regulation on small plans also would be mitigated by the fact that most of the

³¹ Profit Sharing/401k Council of America, 52nd Annual Survey of Profit Sharing and 401(k) Plans, for plan year 2008.

information required for the TDF disclosures is expected to be readily available from service providers.

Congressional Review Act

The proposed rule is subject to the Congressional Review Act provisions of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 801 et seq.) and, if finalized, will be transmitted to Congress and the Comptroller General for review. The proposed rule is not a “major rule” as that term is defined in 5 U.S.C. 804, because it is not likely to result in (1) an annual effect on the economy of \$100 million or more; (2) a major increase in costs or prices for consumers, individual industries, or Federal, State, or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.

Unfunded Mandates Reform Act

For purposes of the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4), as well as Executive Order 12875, the proposed rule does not include any Federal mandate that may result in expenditures by State, local, or tribal governments in the aggregate of more than \$100 million, adjusted for inflation, or increase expenditures by the private sector of more than \$100 million, adjusted for inflation.

Federalism Statement

Executive Order 13132 (August 4, 1999) outlines fundamental principles of federalism, and requires the adherence to specific criteria by Federal agencies in the process of their formulation and implementation of policies that have substantial direct effects on the States, the relationship between the national government and States, or on the distribution of power and responsibilities among the various levels of government. The proposed regulation does not have federalism implications because it has no substantial direct effect on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Section 514 of ERISA provides, with certain exceptions specifically enumerated, that the provisions of Titles I and IV of ERISA supersede any and all laws of the States as they relate to any employee benefit plan covered under ERISA. The requirements that would be implemented in the proposed rule do not alter the fundamental reporting and disclosure requirements of the statute with respect to employee benefit plans, and as such have no implications for the States or the relationship or distribution of power between the national government and the States.

List of Subjects in 29 CFR Part 2550

Employee benefit plans, Exemptions, Fiduciaries, Investments, Pensions, Prohibited transactions, Real estate, Securities, Surety bonds, Trusts and Trustees.

For the reasons set forth in the preamble, the Department of Labor proposes to amend 29 CFR Part 2550 as follows:

PART 2550—RULES AND REGULATIONS FOR FIDUCIARY RESPONSIBILITY

1. The authority citation for part 2550 is revised to read as follows:

Authority: 29 U.S.C. 1135 and Secretary of Labor’s Order No. 6–2009, 74 FR 21524 (May 7, 2009). Sec. 2550.401c–1 also issued under 29 U.S.C. 1101. Sec. 2550.404a-1 also issued under sec. 657, Pub. L. 107-16, 115 Stat. 38. Sections 2550.404c–1 and 2550.404c-5 also issued under 29 U.S.C.1104. Sec. 2550.408b–1 also issued under 29 U.S.C. 1108(b)(1) and sec. 102, Reorganization Plan No. 4 of 1978, 5 U.S.C. App. 1. Sec. 2550.408b–19 also issued under sec. 611, Pub. L. 109–280, 120 Stat. 780, 972, and sec. 102, Reorganization Plan No. 4 of 1978, 5 U.S.C. App. 1. Sec. 2550.412–1 also issued under 29 U.S.C.1112.

2. Amend § 2550.404a-5 by revising paragraph (i)(4) to read as follows:

§ 2550.404a-5 Fiduciary requirements for disclosure in participant-directed individual account plans.

* * * * *

(i) * * *

(4) Target date or similar funds. In the case of a designated investment alternative that is described in 29 CFR 2550.404c-5(e)(4)(1) (e.g., “life-cycle” or “target date” funds) the plan administrator shall, in addition to the information required by paragraph (d)(1) and, if applicable, paragraph (i) of this section, furnish to each participant or beneficiary the following information as an appendix or appendices to the chart or similar document intended to satisfy paragraph (d)(2) of this section –

(i) An explanation of the alternative’s asset allocation, how the asset allocation will change over time, and the point in time when the alternative will reach its most conservative asset allocation; including a chart, table, or other graphical representation that illustrates such change in asset allocation over time and that does not obscure or impede a participant’s or beneficiary’s understanding of the information explained pursuant to this paragraph (i)(4)(i);

(ii) If the alternative is named, or otherwise described, with reference to a particular date (e.g., a target date), an explanation of the age group for whom the alternative is designed, the relevance of the date, and any assumptions about a participant’s or beneficiary’s contribution and withdrawal intentions on or after such date; and

(iii) A statement that the participant or beneficiary may lose money by investing in the alternative, including losses near and following retirement, and that there is no guarantee that the alternative will provide adequate retirement income.

* * * * *

3. Amend § 2550.404c-5 by revising paragraphs (c)(4), (d)(3), (d)(4), and (d)(5) to read as follows:

§ 2550.404c-5 Fiduciary relief for investments in qualified default investment alternatives.

* * * * *

(c) * * *

(4) A fiduciary provides to a participant or beneficiary the material set forth in 29 CFR 2550.404a-5(d)(3) and (4) relating to a participant's or beneficiary's investment in a qualified default investment alternative;

* * * * *

(d) * * *

(3) A description of the qualified default investment alternative, including:

(i) The name of the investment's issuer;

(ii) The investment's objectives or goals;

(iii) The investment's principal strategies (including a general description of the types of assets held by the investment) and principal risks;

(iv) The investment's historical performance data and a statement indicating that an investment's past performance is not necessarily an indication of how the investment will perform in the future; and, if applicable, a description of any fixed return, annuity, guarantee, death benefit, or other ancillary features;

(v) The investment's attendant fees and expenses, including:

(A) Any fees charged directly against the amount invested in connection with acquisition, sale, transfer of, or withdrawal (e.g., commissions, sales loads, sales charges, deferred sales charges, redemption fees, surrender charges, exchange fees, account fees, and purchase fees);

(B) Any annual operating expenses (e.g., expense ratio); and

(C) Any ongoing expenses in addition to annual operating expenses (e.g., mortality and expense fees); and

(vi) For an investment fund product or model portfolio intended to satisfy paragraph (e)(4)(i) of this section, and to the extent not already disclosed pursuant to this paragraph (d)(3):

(A) An explanation of the asset allocation, how the asset allocation will change over time, and the point in time when the qualified default investment alternative will reach its most conservative asset allocation; including a chart, table, or other graphical representation that illustrates such change in asset allocation over time and that does not obscure or impede a participant's or beneficiary's understanding of the information explained pursuant to this paragraph (d)(3)(vi)(A);

(B) If the qualified default investment alternative is named, or otherwise described, with reference to a particular date (e.g., a target date), an explanation of the age group for whom the investment is designed, the relevance of the date, and any assumptions about a participant's or beneficiary's contribution and withdrawal intentions on or after such date; and

(C) If applicable, a statement that the participant or beneficiary may lose money by investing in the qualified default investment alternative, including losses near and following retirement, and that there is no guarantee that the investment will provide adequate retirement income.

(4) A description of the right of the participants and beneficiaries on whose behalf assets are invested in a qualified default investment alternative to direct the investment of those assets to any other investment alternative under the plan and, if applicable, a statement that certain fees and limitations may apply in connection with such transfer; and

(5) An explanation of where the participants and beneficiaries can obtain additional investment information concerning the qualified default investment alternative and the other investment alternatives available under the plan.

* * * * *

Signed at Washington, D.C., this 16th day of November, 2010.

Phyllis C. Borzi

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

BILLING CODE 4510-29-P

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