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## **DEPARTMENT OF LABOR**

### **Employee Benefits Security Administration**

#### **29 CFR Part 2550**

#### **RIN 1210-AB54**

### **Amendment Relating to Reasonable Contract or Arrangement Under Section 408(b)(2) – Fee Disclosure/Web Page**

**AGENCY:** Employee Benefits Security Administration, Labor.

**ACTION:** Direct final rule.

**SUMMARY:** This document revises the mailing address and web-based submission procedures for filing certain notices under the Department of Labor (Department) Employee Benefits Security Administration’s fiduciary-level fee disclosure regulation under section 408(b)(2) of the Employee Retirement Income Security Act of 1974 (ERISA). Responsible plan fiduciaries of employee pension benefit plans must file these notices with the Department to obtain relief from ERISA’s prohibited transaction provisions that otherwise may apply when a covered service provider to the plan fails to disclose information in accordance with the regulation’s requirements.

**DATES:** This amendment to the 408(b)(2) regulation is effective [INSERT DATE THAT IS 60 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER], without further action or notice, unless significant adverse comment is received by [INSERT DATE THAT IS 30 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER]. If significant adverse comment is received, the Department will publish a timely withdrawal of this amendment in the **Federal Register**.

**ADDRESSES:** Written comments may be submitted to the addresses specified below. All comments will be made available to the public. *Warning:* Do not include any personally identifiable information (such as name, address, or other contact information) or confidential business information that you do not want publicly disclosed. All comments may be posted on the Internet and can be retrieved by most Internet search engines. Comments may be submitted anonymously.

Comments, identified by RIN 1210–AB54, may be submitted by one of the following methods:

- *Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.
- *Email:* [e-ORI@dol.gov](mailto:e-ORI@dol.gov)
- *Mail or Hand Delivery:* 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:* RIN 1210-AB54; Class Exemption Notice - Web Submission.

Comments received by the Department of Labor may be posted without change to <http://www.regulations.gov> and <http://www.dol.gov/ebsa>, and will be made available for public inspection at the Public Disclosure Room, N-1513, Employee Benefits Security Administration, 200 Constitution Avenue NW, Washington, DC 20210.

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

**SUPPLEMENTARY INFORMATION:**

**A. Background**

On February 3, 2012, the Department published a final regulation under ERISA section 408(b)(2) (the “408(b)(2) regulation”), requiring that certain service providers to pension plans disclose information about the service providers’ compensation and potential conflicts of interest.<sup>1</sup> These disclosure requirements were established to provide guidance for compliance with a statutory exemption from ERISA’s prohibited transaction provisions. If the disclosure requirements of the 408(b)(2) regulation are not satisfied, a prohibited provision of services

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<sup>1</sup> 77 FR 5632 (Feb. 3, 2012).

under ERISA section 406(a)(1)(C) will occur, with consequences for both the responsible plan fiduciary and the covered service provider. However, paragraph (c)(1)(ix) of the final regulation exempts a responsible plan fiduciary from the prohibited transaction restrictions, if the fiduciary takes certain specified steps upon discovery of a disclosure failure. Among other steps, the responsible plan fiduciary must make a written request to the covered service provider for the undisclosed information. If the covered service provider does not comply with this request within 90 days, the responsible plan fiduciary must so notify the Department.

The final 408(b)(2) regulation, in paragraph (c)(1)(ix)(F), provides two alternative methods for submitting such notices to the Department. Responsible plan fiduciaries may send notices to the following address: U.S. Department of Labor, Employee Benefits Security Administration, Office of Enforcement, 200 Constitution Ave., N.W., Suite 600, Washington, DC 20210. Alternatively, notices may be sent electronically to [OE-DelinquentSPnotice@dol.gov](mailto:OE-DelinquentSPnotice@dol.gov). The direct final rule published today, and described below, amends these submission procedures to reflect a new mailing address and to provide for electronic submission through the Department's website.

## **B. Overview of Amendment to 408(b)(2) Regulation**

The direct final rule being published today as part of this notice amends 29 CFR 2550.408b-2(c)(1)(ix)(F) to revise the mailing address and enhance the web-based submission procedure for responsible plan fiduciaries to file required notices under the regulation's fiduciary class exemption provision. Fiduciaries may continue to send paper notices to the Department;

however, a dedicated post office box has been established to replace the original mailing address. The new mailing address is: U.S. Department of Labor, Employee Benefits Security Administration, Office of Enforcement, P.O. Box 75296, Washington, DC 20013. Further, effective [INSERT DATE THAT IS 60 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER], the Department is eliminating the previously available email address ([OE-DelinquentSPnotice@dol.gov](mailto:OE-DelinquentSPnotice@dol.gov)). Instead, pursuant to instructions that will be separately provided by the Department, responsible plan fiduciaries who wish to submit notices electronically will be able to do so through a dedicated link on the Department's Web site, at [www.dol.gov/ebsa/regs/feedisclosurefailurenotice.html](http://www.dol.gov/ebsa/regs/feedisclosurefailurenotice.html). This web page will include clear instructions for how to submit the required notification and will provide immediate confirmation to responsible plan fiduciaries that the notice has been received by the Department.

The Department believes that the new web submission procedure will benefit both responsible plan fiduciaries and the Department and, therefore, does not anticipate any significant adverse comment on this amendment. The submission process will be easier for responsible plan fiduciaries, because the web page will include clear instructions and will assist responsible plan fiduciaries by ensuring that they include all of the information required by the regulation's notice provision. Plan fiduciaries, especially for small plans, will be more easily able to take advantage of the relief provided by the 408(b)(2) regulation's class exemption provision. Further, unlike submissions by email or paper mail, the web-based submission procedure will include immediate, electronic confirmation for responsible plan fiduciaries that their notice has been received. The online submission procedure also will benefit the Department by enabling its staff to more efficiently receive, process, and review class exemption

notices under the 408(b)(2) regulation, which in turn will benefit responsible plan fiduciaries who wish to avail themselves of relief provided by the regulation's class exemption. The Department expects that responsible plan fiduciary errors will be fewer, due to the web-based procedures that will include clear instructions and better ensure that complete information is submitted, and that transcription and other errors by the Department will be fewer, due to the automated procedures that will occur when submissions are received electronically.

### **C. Good Cause Finding That Proposed Rulemaking Unnecessary**

Rulemaking under section 553 of the Administrative Procedure Act (5 U.S.C. 551 *et seq.*) (APA) ordinarily involves publication of a notice of proposed rulemaking in the **Federal Register** and the public is given an opportunity to comment on the proposed rule. However, an agency may issue a rule without prior notice and comment procedures if it determines for good cause that public notice and comment procedures are impracticable, unnecessary, or contrary to the public interest for such rule, and incorporates a statement of the finding with the underlying reasons in the final rule issued. For the reasons mentioned in section B of this preamble, the Department finds that publishing a proposed rule and seeking public comment is unnecessary.

Notwithstanding the foregoing, in the "Proposed Rules" section of today's **Federal Register**, the Department is publishing a separate document that will serve as a notice of proposal to amend part 2550 as described in this direct final rule. If the Department receives significant adverse comment during the comment period, it will publish, in a timely manner, a document in the **Federal Register** withdrawing this direct final rule. The Department will then

address public comments in a subsequent final rule based on the proposed rule. The Department will not institute a second comment period on this rule. Any parties interested in commenting must do so during this comment period.

#### **D. Regulatory Impact Analysis**

##### *1. Executive Orders 12866 and 13563*

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility.

Section 3(f) of Executive Order 12866 defines a “significant regulatory action” as an action that is likely to result in a rule (1) having an annual effect on the economy of \$100 million or more, 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. Pursuant to the terms of the Executive Order, OMB has been determined that this action is not “significant” within the meaning of section 3(f)(4) of the Executive Order and therefore is not subject to review by OMB.

## 2. *Regulatory Flexibility Analysis*

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 APA (5 U.S.C. 551 et seq.) and that are likely to have a significant economic impact on a substantial number of small entities. Under Section 553(b) of the APA, a general notice of proposed rulemaking is not required when an agency, for good cause, finds that notice and public comment thereon are impracticable, unnecessary, or contrary to the public interest. This direct final regulation is exempt from the APA's notice and comment requirements because the Department made a good cause finding earlier in this preamble that a general notice of proposed rulemaking is not necessary. Therefore, the RFA does not apply and the Department is not required to either certify that this regulation would not have a significant economic impact on a substantial number of small entities or conduct a regulatory flexibility analysis.

Nevertheless, the Department carefully considered the likely impact of the rule on small entities. The direct final rule will enhance the web-based submission procedure for responsible plan fiduciaries, especially for small plans, to file required notices under the regulation's



fiduciary class exemption provision. The web page will include clear instructions and ensure that responsible plan fiduciaries include all of the required information and provide an immediate electronic confirmation that their notice has been received. No additional burden is imposed on such fiduciaries, because, as discussed earlier in this preamble, the direct final rule allows them to continue to send notices to a dedicated post office box that the Department has established to replace the original mailing address provided in the final rule. Based on the foregoing, the Department hereby certifies that the proposed rule is not likely to have a significant economic impact on a substantial number of small entities.

3. *Paperwork Reduction Act*

In accordance with the requirements of the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3506(c)(2)), the Department submitted an information collection request (ICR) to OMB in accordance with 44 U.S.C. 3507(d) for the final regulation that was published on February 3, 2012. OMB approved the ICR on March 29, 2012, under control number 1210-0133, which is currently schedule to expire on March 31, 2015. A copy of the ICR may be obtained by contacting the PRA addressee shown below.

PRA Addressee: G. Christopher Cosby, Office of Policy and Research, U.S. Department of Labor, Employee Benefits Security Administration, 200 Constitution Avenue, NW., Room N 5647, Washington, DC 20210. Telephone (202) 219-8410; Fax: (202) 219 4745. These are not toll free numbers.

OMB has determined that the direct final rule does not implement any substantive or material change to the information collection; therefore, no change is made to the ICR and no further review is requested of OMB at this time.

4. *Congressional Review Act*

This direct final 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 has been transmitted to Congress and the Comptroller General for review.

5. *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 direct final 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.

6. *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 direct final rule 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 implemented in the direct final 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, Reporting and recordkeeping requirements, and Securities.

For the reasons set forth in the preamble, the Department amends chapter XXV, subchapter F, part 2550 of title 29 of the Code of Federal Regulations as follows:

#### **SUBCHAPTER F – FIDUCIARY RESPONSIBILITY UNDER THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974**

**PART 2550—RULES AND REGULATIONS FOR FIDUCIARY RESPONSIBILITY**

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

**Authority:** 29 U.S.C. 1135 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. Section 2550.408b-2 is amended by revising paragraph (c)(1)(ix)(F) to read as follows:

**§ 2550.408b-2 General statutory exemption for services or office space.**

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(c) \* \* \*

(1) \* \* \*

(ix) \* \* \*

(F) The notice required by paragraph (c)(1)(ix)(C) of this section shall be furnished to the U.S. Department of Labor electronically in accordance with instructions published by the Department; or may be sent to the following address: U.S. Department of Labor, Employee Benefits Security Administration, Office of Enforcement, P.O. Box 75296, Washington, DC 20013; and

\* \* \* \* \*

Signed at Washington, D.C., this 2nd day of July, 2012.

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Phyllis C. Borzi

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

**BILLING CODE 4510-29-P**

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