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## DOL Proposes Additional Fee and Investment-Related Disclosures for Participant-Directed Plans

On July 22, 2008 the U.S. Department of Labor (“DOL”) issued proposed regulations that would impose additional disclosure requirements for participant-directed individual account retirement plans. These rules focus on the disclosure of fee and expense information relating to plan administration and investments, as well as information that would identify the investment alternatives and provide performance data and benchmarks for the investment alternatives. The rules would require the disclosure of this information at least annually in a format that would allow participants to compare the fees and characteristics of the investment alternatives offered under the plan.

The proposed rules can be found [here](#), and a related DOL fact sheet can be found [here](#). The regulations are proposed to be effective for plan years beginning on or after January 1, 2009. Comments regarding the proposed regulations are due by September 8, 2008.

### Summary of Proposed Guidance

The rules propose to expand the fiduciary duties related to participant-directed individual account plans to include a duty to disclose certain fee and expense information and other information regarding investments and the right to direct investments. To satisfy the duty to disclose, fiduciaries must provide participants with certain plan-related and investment-related information when they first become eligible, and on a quarterly or annual basis. In connection with the new disclosure requirements, the DOL has also proposed certain changes to the disclosure requirements for plans that currently comply with ERISA section 404(c).

#### Plan-Related Information

The regulations would require the disclosure of three types of plan-related information: general information regarding investment rights and alternatives, administrative expense information, and individual expense information.

- **General Information.** The general information disclosures with respect to investment rights and alternatives include: the process for choosing or changing an investment; any limits on the ability to change investments; the provisions for voting, tender, and similar rights; a listing of investment alternatives offered under the plan; and the names of designated investment managers.
  - This information is to be provided on or before the date a participant or beneficiary becomes eligible for the plan (as opposed to the date he or she actually enrolls in the plan), and at least annually thereafter (*i.e.*, according to the preamble, at least once in any 12-month period regardless of whether the plan operates on a fiscal or calendar year basis).
  - The fiduciaries must also provide participants and beneficiaries with information regarding any material changes to this information within 30 days after the date that the change is adopted.
  - The information may be made part of the summary plan description (“SPD”) if it is distributed at the required times.

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It is unclear whether the information must be provided annually to an employee who chooses not to enroll in the plan or whether the rule permitting use of the SPD indicates annual distribution would not be required for such an employee.

- **Administrative Expense Information.** The administrative expense information to be disclosed includes an explanation of any fees and expenses for plan administrative services that may be charged to the plan (to the extent not included in investment-related fees) and the manner in which these charges will be allocated to participants' accounts.
  - Like the general information disclosures, this administrative expense information must be disclosed on or before the individual's eligibility date and at least annually thereafter, and it may be included in the summary plan description.
  - At least quarterly, participants and beneficiaries must also be provided with a statement of the amounts actually charged to their accounts for administrative services and a general description of those charges. The preamble indicates that the charges need not be listed on a service-by-service basis (e.g., applicable services may be labeled simply as "recordkeeping"), and this information may be included in the quarterly benefit statement required by the Pension Protection Act of 2006.
  
- **Individual Expense Information.** Finally, the rules would require disclosure of any fees that may be assessed against a participant's individual account, including fees for processing a QDRO or a loan and fees for investment advice. This requirement would not apply to fees that are assessed against all participants who choose to invest in a particular vehicle; instead, only those fees chargeable to a specific participant would be subject to individual disclosure.
  - Disclosure of these individual expenses must be provided on or before the date that an individual becomes eligible to participate in the plan, and at least annually thereafter.
  - Like the general and administrative expense information, the description of individual fees may also be included in the summary plan description.
  - In addition, the plan fiduciary must provide participants with a quarterly statement that includes the dollar amount actually charged to the participant's individual account during that quarter and a description of the services actually provided.

## Investment-Related Information

The regulations would also require the disclosure of certain investment-related information. While most of this information must be provided to a participant automatically under the proposal, other information, such as prospectuses and financial statements, is required to be furnished to a participant or beneficiary only upon request.

- **Identifying Information.** Under the proposal, a fiduciary must automatically provide participants and beneficiaries with certain identifying information regarding each investment option under the plan when they become eligible for the plan. The identifying information includes: information regarding the category of the investment and its management style (for instance, index or balanced fund), information on whether the fund is actively or passively managed, and a web address where information, such as the principal investment strategies and risks for the investment option, can be found.

- **Performance Data.** In addition, the fiduciary must provide participants with certain performance data regarding each designated investment alternative, including 1-year, 5-year, and 10-year performance data (to the extent available), the rate of return and term for fixed-rate investments, and performance data for an appropriately similar investment index or other benchmark.
- **Investment Fees.** The rules would also require the fiduciary to disclose the amount and description of each shareholder-type fee charged by each investment alternative (such as sales fees, redemption fees, and surrender charges), each investment's operating expense ratio, and a statement informing participants that fees and expenses are only one of several factors that participants and beneficiaries should consider when making investment decisions. For fixed-rate investments, the fiduciary must provide the amount and description of any fees applicable to the purchase, transfer, or withdrawal of the investment.
- **Other Information.** In addition, if a plan provides for pass-through voting, tender, or similar rights related to equity investments, the proposal requires the fiduciary to furnish participants and beneficiaries with certain post-investment information regarding these rights similar to the requirements currently found in ERISA section 404(c).

The rules would require that the investment-related information be provided to individuals in the form of a chart "or similar format" that will permit participants to compare the information across investment alternatives, along with a statement noting that more current information may be available on the website for the investment alternative and listing the name and contact information of the plan fiduciary or other person who can provide prospectuses and other detailed information (including a complete list of assets for any look-through investment such as a separate account or a common or collective trust). While the DOL has provided a safe-harbor [model disclosure chart](#) that may be used for satisfying investment-related disclosure requirements, use of the model disclosure chart is not mandated by the rules.

Under the proposal, newly-eligible individuals may be provided with the most recent investment-related data provided to participants and beneficiaries. The proposed rules clarify that these investment-related disclosures are not required for brokerage windows or self-directed brokerage accounts. Also, the preamble indicates that a fiduciary will not be held responsible for the accuracy of information distributed by a service provider to the extent that the fiduciary relies on the information reasonably and in good faith.

### **Amendments to ERISA Section 404(c) Rules**

The proposed regulations also include amendments to the section 404(c) regulations. To distinguish between the requirements of the proposed rules and the section 404(c) voluntary disclosures, as well as to "avoid having different disclosure rules for plans intending to comply with the section 404(c) requirements," the proposed rules integrate section 404(c) requirements with the new fiduciary duties described above.

For plans that currently comply with section 404(c), the rules propose to eliminate certain specific disclosures. Under the proposal, these disclosures would instead be required for all fiduciaries of plans that permit participants to direct the investment of their accounts, regardless of whether a 404(c) election has been made for the plan. Specifically, the proposed rules would delete the requirements in the section 404(c) regulations that a plan fiduciary provide: (1) a description of available investment alternatives, objectives, and risk and return characteristics; (2) an explanation of when a participant or beneficiary may and may not give investment instructions; (3) a description of transaction fees and expenses; and (4) the name, address and phone number of the plan fiduciary. Instead, the proposed regulations include a simple cross reference to the new disclosure rules, stating that a plan complying with 404(c) must also supply the information required under those regulations.

The DOL takes care to note that compliance with the proposed rules will not relieve a fiduciary of his or her duty to prudently select and monitor service providers and the investments made available under the plan. The rules emphasize this concept by including a specific statement to this effect in the section 404(c) regulations.



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