

U.S. Department of Labor Requires New Participant Fee Disclosures

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The U.S. Department of Labor recently issued the third of its three-part series of regulations requiring greater disclosure of plan fees. The newly proposed regulations require new disclosures to participants who make investment elections under 401(k) and other defined contribution plans.

The other two sets of rules, which apply to all types of plans, require new disclosure of direct and indirect service provider fees and compensation information on Schedule C of plan annual reports (Form 5500) beginning with the 2009 Annual Reports. They also require disclosure of service provider fees, compensation and potential conflicts of interest to employee benefit plan fiduciaries who are hiring those providers. This last set of regulations was proposed to be effective as of 90 days after the issuance of final regulations, which are anticipated before the end of 2008. While fiduciaries of defined contribution plans should be preparing to comply with all three sets of regulations, this Osler Update focuses on the participant disclosure regulations because they may require major changes in communications and have the earliest proposed compliance date.

Which Plans are Covered?

The newly proposed regulations would require at least annual disclosure of plan information and (in most cases) of investment options to participants in all defined contribution plans that permit participants to direct the investment of their accounts, regardless of whether the plan fiduciaries are attempting to take advantage of the “safe harbor” under Section 404(c) of the *Employee Retirement Income Security Act of 1974* (ERISA). (“Section 404(c)”) That section protects compliant fiduciaries from liability for losses when the participant “controls” the investment of his or her account.

Since the proposed regulations would cover plans not previously subject to detailed disclosure requirements, sponsors and fiduciaries of plans not complying with Section 404(c) may have to develop a package of new participant communications spelling out information they are not currently providing, such as how to change investment elections or exercise voting rights. Further, sponsors of 404(c) plans will need to modify their current procedures and may want to use a model chart for investments provided as part of the regulations. However, the investment option disclosures are generally not required for truly self-directed accounts, such as “open window” brokerage accounts.

What are the Primary Fee Disclosure Changes?

Although the new regulations generally add to the information required to be given to participants, one major change reduces the obligations of fiduciaries as compared to current law. In this regard, the regulations would no longer require that prospectuses be distributed automatically to participants at the time they enroll in the plan.

Additional significant new disclosure obligations include the following:

1. Quarterly participant statements must detail any fees being directly deducted from accounts and describe the related services (such as recordkeeping);
2. Individually assessed fees, such as loan processing fees or fees for reviewing domestic relations orders, must be disclosed in advance and, where actually assessed, must be shown as itemized entries on the statements of affected participants;
3. Returns on investment choices must be compared to a benchmark, such as the S&P 500 for equity funds; and
4. In addition to the annual disclosures, disclosures must be given to new participants and updated disclosures must be provided within 30 days of material changes to the required information.

Interestingly, the regulations do not contain an explicit requirement that the “revenue sharing” arrangements that are being challenged in many pending court cases, such as in *Haddock v. Nationwide Financial Services*, (D. Conn, No. 3:01cv1552), be disclosed to participants. The Department of Labor has apparently concluded that this information is not generally material to participant investment decisions (although the courts or Congress may ultimately decide otherwise) and seems to have put the burden on the plan’s fiduciaries to evaluate and be responsible for these arrangements under the proposed service contract regulations.

Action Plan for 2008

We recommend that plan sponsors and fiduciaries review their benefit statements and communications on investment choices as soon as possible to leave time to develop new disclosure documents and software systems, redesign benefit statements and prepare comparative investment charts before January 1 or any later compliance deadline established by the Department of Labor. In our experience, these projects always take longer than anticipated.

Clients with questions about any of the three sets of new disclosure rules or needing compliance assistance may contact **[Carol Buckmann](#)**.

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