

## in focus

October 2010

**DOL Releases Final Rule for Participant Disclosures**

*Plan fiduciaries will be required to provide detailed plan information to employees.*

The Department of Labor has released a final rule requiring certain regular and periodic disclosures to participants in participant-directed individual account plans (e.g., 401(k) plans where participants can select among investment options provided under the plan). The rule applies to all participant-directed individual account plans, regardless of size (there is no small plan exception); however, the rule does not apply to IRA-based plans that are 408(k) simplified employee pensions and 408(p) SIMPLE plans.

The plan administrator has the obligation under the rule to provide the required disclosures. The disclosures must be made to all eligible employees, regardless of whether an employee has enrolled in the plan, and to all beneficiaries who have the right to direct the investment of their accounts.

Individual account plans must comply with the new rule on the first day of the plan year beginning on or after November 1, 2011. For calendar year plans, the rule applies beginning January 1, 2012. Initial disclosures must be provided no later than 60 days after the date the rule first applies to all participants and beneficiaries who, on such date, could direct the investment of their accounts (i.e., initial disclosures must be provided on or prior to March 1, 2012 for calendar year plans).

The rule requires plan administrators to make certain disclosures to plan participants and beneficiaries that fall into two main categories: (1) plan-related information, which includes general operation and identification information, plan administrative fees and expenses, and individual expenses; and (2) investment-related information, which includes information on investment fees, operating expenses, investment returns, and benchmarks.

*Plan-Related Information*

The new rule requires plan administrators to disclose the following plan-related operational and identification information:

- (a) an explanation of the circumstances under which participants and beneficiaries may give investment instructions;
- (b) an explanation of any specified limitations on such instructions under the terms of

the plan, including any restrictions on the transfer to or from a designated investment option (*i.e.*, plan-based limitations and restrictions on a participant's ability to direct investments);

- (c) a description of, or reference to, plan provisions relating to the exercise of voting, tender and similar rights related to an investment as well as any restrictions on the right;
- (d) an identification of the designated investment options under the plan;
- (e) an identification of any designated investment managers; and
- (f) a description of any "brokerage windows," "self-directed brokerage accounts," or similar plan arrangements that enable the participants to select investments beyond those designated by the plan.

The plan administrator must also furnish an explanation of (i) the fees and expenses charged against participant accounts for general plan administrative services and a description of how the fees are allocated among participant accounts, and (ii) any fees and expenses that may be charged against participant accounts on an individual basis, such as plan loan fees, redemption fees, QDRO fees, and investment advisory fees, that are not included in the investments' operating expenses.

The plan administrator must furnish the foregoing information to eligible employees on or before the date that they can first direct their investments and annually thereafter. If there is a change in any of the information described above, the plan administrator must furnish notice of the change at least 30 days, but no more than 90 days, before the change is effective (barring unforeseeable circumstances beyond the plan administrator's control, in which case notice must be provided as soon as reasonably practicable). The change does not have to be material to be disclosed.

The rule also requires fees and expenses that are actually charged against a participant's account (on both a plan-wide and individual basis) to be disclosed at least quarterly. The disclosure must include the dollar amount of the fee/expense, a description of the services, and an explanation, if applicable, that some of the plan's administrative expenses were paid from the operating expenses of the investment option.

This information described above may be provided as part of the plan's summary plan description or as part of a pension benefit statement but must still satisfy the frequency requirements. Not surprisingly, the disclosure must be written to be understood by the average plan participant.

#### *Investment-Related Information*

The plan administrator must provide to participants the following investment-related

information on each of the plan's designated investment options:

- (a) the name of the investment option;
- (b) the investment type or category;
- (c) the average annual total return of the investment (as a percentage) for the 1-, 5-, and 10-calendar year periods (or for the life of the investment option, if shorter), if the return is not fixed;
- (d) if the return is fixed, the rate of return and, if applicable, the term of the investment, minimum rate guaranteed, and a statement of the issuer's right to adjust the rate of return and how to obtain the most recent rate of return;
- (e) the name and returns of an appropriate broad-based securities market index (which is not administered by an affiliate of the issuer, adviser or principal underwriter unless widely used) over the 1-, 5-, and 10-calendar year periods (or for the life of the investment option, if shorter) compared to the performance of the investment option; and
- (f) the fee and expense information, including:
  - (1) each shareholder-type fee (a fee charged directly against a participant's investment or account),
  - (2) description of any restrictions or limitations that may be applicable to a purchase, transfer, or withdrawal of the investment,
  - (3) the total annual operating expenses of the investment, expressed as a percentage,
  - (4) the total annual operating expenses of the investment for a one-year period, expressed as a dollar amount for a \$1,000 investment,
  - (5) a statement that fees and expenses are only one of several factors that participants should consider when making investment decisions,
  - (6) a statement that the cumulative effect of fees and expenses can substantially reduce the growth of a participant's retirement account and that participants can visit the Employee Benefit Security Administration's website for information and an example of the long-term effect of fees and expenses.

If the return of the investment is fixed, the fee and expense disclosure need only include the amount and a description of any shareholder-type fees and any restrictions or limitations that may be applicable to a purchase, transfer, or withdrawal of the investment.

The plan administrator must provide a website address where participants can find supplemental information on the designated investment option, including the name of the investment's issuer/provider, its objectives or goals, its principal strategies and risks, its portfolio assets, its portfolio turnover rate, its performance data (updated at least quarterly), and its related fees and expenses. If the investment option is a fixed return investment, the website need only include the name of the investment's issuer, its objectives or goals, its performance data (updated at least quarterly), and its fee and expense information.

The investment-related information required above should be set out in a chart or similar format to the extent possible to facilitate comparison of the investment options. The chart should be dated and include a statement indicating the name, address, and phone number of the plan administrator, a statement that additional investment-related information is available at the listed website address(es), and a statement explaining how to request, free of charge, a paper copy of the information that is posted on the website(s). Furnishing separate charts to participants from individual investment issuers would not, in the DOL's view, comply with the new rule. The DOL has provided a model chart for this purpose, which is available here: [DOL Model Chart](#).

It is not clear from the rule who is required to maintain the website containing the supplemental information. The DOL states that the plan administrator is responsible for making the website available, and may have responsibility for establishing and maintaining the site depending on whether the investment issuer or service provider assumes any responsibility for establishing and maintaining such a website. If a third party does provide the website, the rule provides that the plan administrator will not be liable for the accuracy of the information if the plan administrator's reliance on the information was reasonable and in good faith.

The plan administrator must also furnish plan participants with a glossary of investment and financial terms. This can be accomplished by including a glossary in the disclosure document, by providing a website address where such a glossary can be found, or by including the glossary on the website described above.

Upon request, a plan administrator must provide a copy of an investment option's prospectus (full or short-form), copies of any financial statements or similar materials if provided to the plan, a statement of the value of a share or unit of each investment option and the date of valuation, and a list of the assets comprising the portfolio of each investment option if they qualify as plan assets and the value of each such asset.

The plan administrator must disclose the investment-related information described for the plan's designated investment options only. Disclosure is not required for investment options outside of those designated by the plan, such as via a "brokerage window" or "self-directed brokerage account." The rule does not prohibit plan administrators from providing to participants information in addition to what is required, but the information cannot be inaccurate or misleading.

The rule contains certain special provisions for options that invest primarily in employer

stock. For these investment options, disclosure of the principal strategies and risks and portfolio turnover is not required. Further, non-unitized employer stock funds are not required to disclose fee and expense information or annual operating expense ratios, and can disclose total shareholder return, rather than average annual total return. However, a statement describing the importance of a well-balanced and diversified portfolio is required for employer stock fund investments. The department recommends using the language in DOL Field Assistance Bulletin 2006-03 for this purpose.

There are also special provisions for annuity investments. In lieu of the information required generally for investment options, a plan administrator must provide to participants the following investment-related information on each of the plan's designated investment options that are annuity investments:

- (a) name of the investment option;
- (b) its objectives or goals;
- (c) the factors that determine the price;
- (d) a description of any restrictions or limitations that may be applicable to a purchase, transfer, or withdrawal of the investment;
- (e) any fees that will reduce the value of amounts allocated by participants (*e.g.*, surrender charges, market value adjustments, and administrative fees);
- (f) a statement that insurance company guarantees are subject to its financial strength and claims-paying ability; and
- (g) an internet website address where participants can find the name of the investment's issuer/provider, its objectives or goals, its distribution alternatives/guaranteed income payments and any limitations on the rights to receive such payments, the costs/factors used to determine the price of benefits, a description any of limitations on the right to withdraw or transfer out of the option and any fees that are charged for withdrawal/transfer, and a description of any fees that will reduce the value of amounts allocated by participants (*e.g.*, surrender charges, market value adjustments, and administrative fees).

The DOL expects to release further guidance for disclosures required for target date-type funds and the manner in which the disclosures may be provided to plan participants.

The new rule is issued under Section 404(a) of ERISA, which governs fiduciary requirements, and is not to be confused with Section 404(c) of ERISA, which contains disclosure obligations (some of which are not required by the new rule) for plans that elect to comply with that section. While the new rule makes certain conforming changes to the regulations under Section 404(c), compliance with Section 404(c) continues to be voluntary. Compliance with the new rule as set forth under Section 404(a), however, is mandatory.

**ACTION ITEM:** Plan administrators should begin reviewing their summary plan descriptions and other participant communications now to determine what updates will be necessary to comply with the new rule.

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