



## Management Alert

# Plan and Investment Disclosure Requirements

### *General*

The Department of Labor has issued final regulations under ERISA Section 404(a) that impose a fiduciary duty on administrators of participant-directed individual account plans (e.g., 401(k) plans and other plans that allow participants to choose among investment alternatives) to regularly disclose *plan-related information* and *investment-related information* to participants and certain beneficiaries. The intent of the regulations is to help participants make informed investment decisions, as the number of participant-directed individual account plans continues to grow and surpass traditional defined benefit plans.

The ERISA Section 404(a) regulations discussed below describe information that *plan administrators* must provide to participants, and are separate from the ERISA Section 408(b)(2) fee disclosure regulations describing information that *service providers* must provide to plan fiduciaries. Seyfarth Shaw will be publishing a client alert about the fee disclosure regulations in the fall.

### *Effective Dates*

On July 13, the Department of Labor extended the effective date for both sets of regulations. Under the new deadline, plan administrators of calendar year plans must begin providing the new disclosures to participants by May 31, 2012, which is 60 days after the date that the service providers have to make disclosures to the plan fiduciaries. As a practical matter, the only plans that will have a deadline after May 31, 2012 are those with a fiscal year beginning between April 1, 2012 and November 1, 2012.

### *Fiduciary Duty*

The regulations make clear that plan administrators of participant-directed plans have a fiduciary duty to provide certain plan and investment information to enable participants to make informed investment decisions. These disclosures must be made to all employees eligible to participate in the plan and to each beneficiary who has a right to direct investments under the plan. Failure to provide the proper disclosures will constitute a breach of fiduciary duty under ERISA.

The new ERISA Section 404(a) disclosure requirements are similar to the existing disclosure requirements under ERISA Section 404(c). The Section 404(c) regulations have been revised to cross-reference the Section 404(a) regulations as to the requirement to provide investment information. Unlike Section 404(c), which is a voluntary safe harbor provision under ERISA, compliance with the new disclosure requirements is mandatory for all participant-directed plans other than individual retirement accounts or annuities and simple retirement accounts.

## *Required Disclosures to Participants*

### **Content of Disclosures**

The plan administrator is responsible for providing *plan-related disclosures* and *investment-related disclosures*.

*Plan-related disclosures* include describing or identifying the following:

- how participants can provide investment instructions,
- the available investment alternatives, including brokerage windows,
- designated investment managers,
- voting rights,
- fees and expenses charged to the plan as a whole (e.g., legal and accounting expenses), including a description of how such fees and expenses are allocated among accounts, and
- fees and expenses charged to individual accounts (e.g., loan, QDRO and investment advice expenses).

In addition to the general description of fees and expenses, each participant must receive a quarterly statement of the actual fees and expenses charged to his or her account during the preceding quarter.

*Investment-related disclosures* include describing or identifying the following:

- the types of investments available under the plan (e.g., stock and/or bond funds, balanced funds and employer securities),
- historical performance data for one, five and 10-year periods,
- market benchmarks,
- fees and expenses imposed by the investment alternatives,
- all shareholder-type fees (e.g., commissions, sales loads, exchange fees), and
- annual operating expenses (as an expense ratio and a dollar amount).

The investment-related disclosures must be provided in a chart or other format that facilitates comparison. The Department of Labor provided a sample chart (see [www.dol.gov/ebsa/participantfeerulemodelchart.doc](http://www.dol.gov/ebsa/participantfeerulemodelchart.doc)). The chart must include a statement that fees and expenses are only one of several factors to consider when investing but also that they can significantly affect investment performance. The new regulations also require a glossary of investment terms to help participants interpret the investment disclosures.

In addition, detailed information related to each investment alternative, such as investment objectives and strategies, historical performance data and fees and expenses, must be available online at a website identified in the disclosure. Although the plan administrator is responsible for ensuring the availability of such websites, the plan administrator may provide the addresses of websites maintained externally by service providers or sponsors of investment alternatives. If a third-party website is not available, (e.g., with respect to certain insurance products or employer securities), the plan administrator remains responsible for ensuring the availability of a related website address.

### ***Time and Manner of Disclosures***

The first set of disclosures to participants and beneficiaries must be made by the date described in “Effective Dates” above (for calendar year plans, May 31, 2012). After that, participants and beneficiaries must receive the disclosures on or before the date they can first direct investments under the plan (often the first day of participation) and annually thereafter. Quarterly statements of expenses actually charged to participants’ accounts must be provided no later than 45 days after the end of each quarter. The initial disclosure of expenses for a calendar year plan is the second quarter of 2012, so the first quarterly statement is due to participants by August 14, 2012 (45 days after June 30).

As long as the timing requirements are satisfied, the plan-related information and investment-related information can be included in the SPD or benefit statements. The quarterly expense information can be included with the benefit statements.

### ***Changes to Information in the Disclosures***

If there are any changes to the information provided in the participant disclosures, the plan administrator must provide a description of the changes between 90 and 30 days in advance of the effective date of the change, unless the plan administrator is unable to provide advance notice due to circumstances beyond the plan administrator’s control, in which case the notice must be provided as soon as practicable.

### ***Special Rules For Certain Investment Alternatives***

The Department of Labor recognizes that certain information required in the new disclosures is not available for each type of investment alternative. As a result, there are certain exemptions or additional disclosure requirements for investment alternatives that were designed to invest primarily in employer securities, that are annuities or similar products or that provide a fixed investment return.

In many cases, investment alternatives designed to invest primarily in employer securities are exempt from certain investment-related disclosures if participants receive actual shares rather than units under the investment alternative. In lieu of these investment disclosures, the plan administrator must provide an explanation about the importance of a well-balanced portfolio.

Investment alternatives that are annuities or that provide for a fixed return are exempt from several investment-related disclosures but must instead provide additional information about the investment alternative.

### ***Other Disclosures to Participants***

In addition to the regular annual and quarterly disclosures, if voting or similar rights are passed through to participants, any related materials that are provided to the plan must be provided to the participants who are invested in the relevant investment alternatives. These materials can be provided to a participant after he or she invests in the investment alternative.

The plan must also make several materials available upon request from plan participants. These materials include, among other things, prospectuses, financial statements, lists of assets in the portfolios of particular investment alternatives and the value of shares or units in particular investment alternatives. As an alternative to offering these items upon request, employers can make these items available at the same time as the initial and annual disclosures.

One important change from the previous Section 404(c) disclosure rules is that the plan is no longer required to automatically provide a copy of the prospectus for a publicly traded investment alternative, such as a mutual fund, the first time a participant invests in the fund. Under the new regulations, prospectuses are now only required to be provided upon request.

### *Next Steps*

The first disclosures under the final regulations must be distributed in less than one year (by May 31, 2012) for calendar year plans. Preparing these disclosures will require significant work in advance of the initial deadline. Plan fiduciaries also will need to review and analyze the information provided by the plan's service providers under the ERISA Section 408(b)(2) regulations, which, as we mentioned previously, we will discuss in a separate client alert.

*If you have any questions in the meantime, please contact your Seyfarth Shaw LLP attorney or any Employee Benefit attorney listed on the website at [www.seyfarth.com/employeebenefits](http://www.seyfarth.com/employeebenefits).*



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