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DEPARTMENT OF LABOR PROPOSES NEW DISCLOSURE REQUIREMENTS FOR PARTICIPANT-DIRECTED INDIVIDUAL ACCOUNT PLANS

The Department of Labor (“DOL”) recently proposed regulations that would require fiduciaries of participant-directed individual account plans (e.g., a 401(k) plan) to disclose certain plan and investment-related information, including fee and expense information, to participants and beneficiaries. The proposed regulations, once finalized, would be effective for plan years beginning on or after January 1, 2009.

Plan-Related Information Disclosures

Under the proposed regulations, fiduciaries must disclose three types of plan-related information to participants and beneficiaries on or prior to the date of plan eligibility and annually thereafter:

- General information about the plan, including how to give investment instructions, a description of any limitations on such instructions, the identity of any designated investment alternatives, and the identity of any designated investment managers;
- Information about administrative fees and expenses chargeable to the plan and an explanation of how such charges will affect participants’ accounts; and
- Information about account-specific fees, such as fees for processing a qualified domestic relations order or a plan loan.

These disclosures may be included in a plan’s summary plan description, as long as the applicable timing requirements are met.

Plan fiduciaries also would have to provide participants and beneficiaries quarterly statements listing and describing in general terms amounts actually charged during the preceding quarter to their accounts for plan administrative expenses and account-specific expenses. Finally, fiduciaries would have to disclose material changes to general plan information within 30 days of their adoption.

Investment-Related Information Disclosures

The proposed regulations also require fiduciaries to provide the following investment-related information automatically with respect to each investment option available in the plan (other than a brokerage window, self-directed brokerage account, or similar arrangement):

- Identifying information, such as the name of the investment, type of investment (e.g., small-cap or large-cap), type of investment management (e.g., active or passive), and a website address leading to more detailed information about the investment (such as a prospectus);
- Performance data for designated investment alternatives for which the return is not fixed, including average total returns for 1-, 5-, and 10-year periods (to the extent available), along with comparisons to appropriate broad-based indexes; and
- Fee and expense information, including the amount and a description of each fee, the expense ratio, and a statement indicating that fees and expenses are only one of several factors to consider when making investment decisions. While all plans should review their disclosures in light of these new requirements, these new requirements may have a greater impact on plans using unitized accounting, requiring such plans to take additional steps to ensure compliance.

Fiduciaries must provide this information in a chart or similar format allowing participants to compare information about investment alternatives, along with a statement that more current information may be available at a specified website and a listing of contact information for the plan fiduciary or other person who can provide prospectuses and other detailed information. The DOL proposal includes a safe-harbor model disclosure chart, which can be found at <http://www.dol.gov/ebsa/modelcomparativechart.doc>.

Like the plan-related information disclosures, the proposed regulations require investment-related information disclosures to be provided on or before the date of initial eligibility, and then annually thereafter. The most recent annual disclosure would suffice for newly-eligible participants and beneficiaries. Prospectuses, financial statements, a list of assets comprising the portfolio of each investment alternative, and the information regarding the value of a share or unit of each designated investment alternative also would have to be furnished to a participant or beneficiary upon request.

Relationship to 404(c) Disclosure Requirements

Many participant-directed individual account plans already have elected to comply with certain disclosure requirements in order to obtain fiduciary liability protection under section 404(c) of ERISA. The proposed regulations' disclosure requirements would apply regardless of whether a plan elects to comply with section 404(c) of ERISA, but the proposed regulations include amendments to the section 404(c) disclosure requirements to conform them to the disclosure requirements being proposed for all participant-directed individual account plans.

If you have any questions regarding the foregoing, please feel free to contact one of the attorneys listed below.

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