

February 8, 2011

Final Participant Fee Disclosure Regulations

I. Background and Overview

The Department of Labor (the “**DOL**”) published the final regulation on fee disclosures to participants and beneficiaries in participant-directed account plans (the “**Regulation**”). The Regulation applies to most “participant-directed individual account plans” (such as 401(k) plans), regardless of whether the plan is intended to comply with Section 404(c) of ERISA.

The Regulation is one part of a three-part set of rules intended to address fee disclosures. The first part addressed the disclosure of service provider fees on Schedule C to Form 5500, and the second part provided interim final rules regarding disclosure of fees by service providers. The Regulation represents the third part, the disclosure of fees and other information by the plan administrator to the plan’s participants and beneficiaries.

While these disclosures are fiduciary obligations of the plan administrators, they will not be liable for reasonable good faith reliance on information received from plan service providers or investment advisors. However, plan fiduciaries are still responsible for the prudent selection and monitoring of plan investment options and service providers.

The Regulation calls for two types of disclosures: (1) plan-related disclosures and (2) investment-related disclosures.

II. Plan-Related Disclosures

There are three primary areas of plan-related disclosures under the Regulation: (1) general plan information; (2) administrative expense information; and (3) individual expense information. The information may be provided in summary plan descriptions (“**SPDs**”) or in quarterly plan statements.

NOTE: *Depending on how often the SPD is updated, the SPD may not be the best mode of providing the required disclosure information.*

All of this information must be provided to each participant or beneficiary on or before the date on which he or she can first direct investments in the plan (the “**Direction Date**”) and annually thereafter. In addition, if there is a change to the foregoing information, the updated information must be provided at least 30 days, but no more than 90 days, in advance of the effective date of the change, unless there were unforeseeable events or circumstances beyond the plan administrator’s control, in which case, the information must be provided as soon as reasonably practicable.

a. General Plan Information

1. Information on how to provide investment instructions;

2. An explanation of any limitations on such instructions, including any restrictions on transfer to or from a designated investment alternative;
3. A description of or reference to the plan provisions regarding the exercise of voting, tender or similar rights;
4. Identification of any designated investment alternatives offered under the plan;
5. Identification of any designated investment managers; and
6. A description of any brokerage windows, self-directed brokerage accounts, or similar plan arrangements that enable participants and beneficiaries to select investments beyond those designated by the plan.

b. Administrative Expense Information

Plan administrators must provide information regarding all fees for general plan administrative services (e.g., legal, accounting, recordkeeping) that may be charged by the plan to the individual participant accounts and that are not reflected in the total annual operating expenses of any designated investment alternative, as well as an explanation of the basis on which such charges will be allocated (e.g., pro rata, or per capita) to, or affect the balance of, each individual account.

NOTE: *Because notice of changes must be made at least 30 days, but no more than 90 days in advance of the change, plan administrators should review their service provider contracts and ensure that the relevant periods in such contracts fit within the time period under the Regulation.*

NOTE: *For full disclosure, plan administrators that are not already informing participants that they may be paying administrative expenses through investment related fees may want to do so, even if not required by the Regulation.*

c. Individual Expense Information

Plan administrators must provide an explanation of any fees or expenses that may be charged to the person's account on an individual basis (e.g., fees for processing plan loans, QDRO orders, investment advice, fees for brokerage windows, commissions, transfer fees, redemption fees, sales charges, and similar expenses) and that are not reflected in the total annual operating expenses of any designated investment alternative.

NOTE: *Plan administrators should begin talking to the plan's third party administrators ("TPAs") to determine how these disclosure requirements will be met. As noted above, because notice of changes must be made at least 30 days, but no more than 90 days in advance of the change, plan administrators should review their TPA contracts and ensure that the relevant periods in such contracts fit within the time period under the Regulation.*

There also are quarterly disclosures required. With respect to administrative expense information, plan administrators, on a quarterly basis, are required to provide a statement to participants and beneficiaries of: (i) the dollar amount of the fees and expenses actually charged during the preceding quarter to the individual accounts; (ii) a description of the services to which the charges relate; and (iii) if applicable, an explanation that, in addition to administrative expense fees and expenses disclosed, some of the plan's administrative expenses for the preceding

quarter were paid from the total annual operating expenses of one or more of the plan's designated investment alternatives (such as through revenue sharing arrangements, Rule 12b-1 fees or sub-transfer agent fees).

With respect to individual expense information, the Regulation requires that plan administrators, on a quarterly basis, provide participants and beneficiaries with a statement that (i) includes the dollar amount of fees and expenses actually charged during the preceding quarter to his or her account; and (ii) a description of the services to which the charges relate.

III. Investment-Related Disclosures

a. *Information to be Provided Automatically*

On or before the Direction Date and at least annually thereafter, the plan administrator, based on the latest information available to the plan, must furnish the following information automatically with respect to each designated investment alternative offered under the plan:

1. *Identifying information*, including the name of each investment, and the type or category of each investment (e.g., money market fund, large-cap stock fund).
2. *Performance data*:
 - A. For investments where the return is not fixed, the average total return of the investment for 1-, 5- and 10-calendar year periods (or for the life of the alternative, if shorter) ending on the date of the most recently completed calendar year, as well as a statement indicating that an investment's past performance is not necessarily an indication of how the investment will perform in the future.
 - B. For investments where the return is fixed, both the fixed or stated annual rate of return and the term of the investment. The participant must also be informed if the rate may be adjusted and provided with the current rate of return, the minimum guaranteed rate of return (if any), and the phone number or website to obtain the most recent rate of return information.
3. *Benchmark information*: The name and returns of an appropriate broad-based securities market index over the 1-, 5- and 10-calendar year periods (or for the life of the alternative, if shorter) comparable to the performance data period provided under the performance data disclosures for the plan's investments; however, the benchmarks cannot be administered by an affiliate of the investment issuer, its investment adviser, or a principal underwriter, unless the index is widely recognized and used.
4. *Fee and expense information*:
 - A. For all investments, the amount and a description of each shareholder-type fee and a description of any restriction or limitation that may be applicable to a purchase, transfer or withdrawal of the investment in whole or in part; and
 - B. For those investments for which the return is not fixed,
 - (i) The total annual operating expenses of the investment expressed as a percentage calculation (expense ratio);

- (ii) The total annual operating expenses of the investment for a one-year period expressed as a dollar amount for a \$1,000 investment;
 - (iii) A statement indicating that fees and expenses are only one of several factors that participants and beneficiaries should consider when making investment decisions; and
 - (iv) A statement that the cumulative effect of fees and expenses can substantially reduce the growth of a participant's or beneficiary's retirement account and that participants and beneficiaries can visit the Employee Benefit Security Administration's website for an example demonstrating the long-term effect of fees and expenses.
5. *Website information:* The plan administrator also must make sure that there is a website available that is sufficiently specific to provide participants and beneficiaries access to specific information regarding each designated investment alternative.
6. *Glossary:* The plan administrator must provide participants and beneficiaries with a general glossary of terms to assist them in understanding the designated investment alternatives, or a website address that is sufficiently specific to provide access to the glossary along with a general explanation of the purpose of the address.

The investment-related information must be provided in a comparative format, such as a chart, in order to help participants evaluate and compare the information for each of the plan's designated investment alternatives. The DOL has provided a model chart that can be found [here](#).

In addition to the foregoing, there are special rules that apply for fixed-return investments, certain annuity options, and qualifying employer securities.

b. Information to be Provided After Investment

After investing in a designated investment alternative, if permitted under the terms of the plan, a participant must receive any materials provided to the plan relating to any pass-through voting, tender, or similar rights that are passed on to the participant or beneficiary.

c. Information to be Provided Upon Request

Similar to the current requirements of ERISA Section 404(c), the following information must be provided upon request:

1. Copies of prospectuses (or any short-form SEC compliant summary prospectus) or similar documents for non-regulated investment options.
2. Copies of any financial statements or reports, such as statements of additional information and shareholder reports, or similar material (if such information is provided to the plan).
3. A statement of the value of a share or unit of each investment alternative (including the date of valuation).

4. A list of assets in the portfolio of the designated investment alternative that constitutes a plan asset under applicable ERISA regulations, and the value of each such asset (or the proportion of the investment which it comprises).

IV. Effective and Applicability Dates

The Regulation is effective as of December 20, 2010, but applies to individual account plans for plan years beginning on or after November 1, 2011. For calendar year plans, the Regulation applies beginning January 1, 2012.

Transition rule: The initial disclosures required on or before the Direction Date must be furnished, no later than 60 days after the date the Regulation applies to the plan, to participants or beneficiaries who had the right to direct the investment of assets held in, or contributed to, their individual account on the date the Regulation applies to the plan.

For reference, a full copy of the Regulation can be found [here](#).

If you have any questions, please contact a member of our [Employee Benefits and Executive Compensation Practice Group](#).