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DOL's Recent Guidance on New Participant Fee Disclosure Regulations Is a "Must Read" for Retirement Plan Fiduciaries Preparing for the August 2012 Deadline

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The Department of Labor recently issued Field Assistance Bulletin 2012-02 (FAB 2012-02), which provides additional guidance in the form of frequently asked questions (FAQs) on the participant fee disclosure regulations.[1] FAB 2012-02 is a must read for plan administrators. It clarifies the fast-approaching deadlines for the required disclosures and makes clear that extensions of the deadline will not be available. The relevant deadlines are as follows:

Deadline/Effective Date	Calendar Year Plans	Non-Calendar Year Plans
Participant disclosure rules are effective	January 1, 2012	First plan year beginning after October 10, 2011
Service provider disclosure rules are effective	July 1, 2012	July 1, 2012
Deadline for first ANNUAL participant disclosure	**August 30, 2012**	August 30, 2012, or, if later, 60 days after the first day of the plan year beginning after November 1, 2011
Deadline for first QUARTERLY participant disclosure	**November 14, 2012**	45 days after the end of the quarter in which disclosure was required

As set forth in the final regulations issued last July, the participant fee disclosure rules, which are the responsibility of the plan administrator or its delegate, generally break down into two categories: required plan information and required investment-related information. The plan information – required annually – includes: (1) general information about how the plan works with regard to investments and fees, including how to give investment instructions under the plan, a current list of the plan's investment options and a description of any "brokerage windows" or similar arrangements allowing the selection of investments beyond those designated by the plan;

1 *See* 75 Fed. Reg. 64910 (Oct. 20, 2010).

(2) upcoming administrative expenses not related to investments that may be allocated to all participant accounts (*e.g.*, recordkeeping fee, estimated annual legal fees); and (3) individual expenses that may be charged to individual participant accounts (*e.g.*, loan fees, QDROs). By contrast, quarterly plan information is required for administrative and individual expenses actually allocated in the preceding quarter to participant accounts, including amounts attributable to revenue sharing.

The required investment-related information includes: (1) historical investment information over a one-, five- and ten-year time horizon for investments that do not provide for a fixed return; (2) fund benchmark information; (3) investment fee and expense information for each fund, expressed as a percentage of assets for each $1,000 invested or "shareholder" type fees for investments without fixed returns, plus any restrictions on the participant's ability to buy or withdraw from any fund; (4) an internet website address where participants can get up-to-date fee information; and (5) a glossary of financial and other terms. Additionally, on an annual basis, the plan administrator must provide a comparative chart of investment information about designated investment alternatives (DIAs, as defined in the regulation). The additional guidance provides helpful insight on the participant fee disclosure requirements, including questions raised by plan practitioners since the issuance of the final participant fee disclosure regulation on October 20, 2010. FAB 2012-02 is also helpful with regard to the covered service provider disclosure requirements finalized on February 3, 2012.[2] Specifically, FAB 2012-02 serves as guidance with regard to the requirement of covered service providers to provide plan fiduciaries with the information needed to meet their participant fee disclosure obligations.

Highlights from FAB 2012-02

Although a number of items are covered in FAB 2012-02, some of the more significant points of clarification are as follows:

Covered Individual Account Plans

- Retirement plans in which participant accounts are comprised of both participant-directed employee contributions and trustee-directed employer contributions are not required to provide investment-related information for the trustee-directed investments.
- Section 403(b) plans that are subject to the Employee Retirement Income Security Act of 1974 (ERISA) are subject to the participant fee disclosure rules; however, the DOL will not take enforcement action where a plan administrator reasonably determines that it is impracticable or impossible to obtain information necessary to provide investment-related information for certain annuity contracts issued before January 1, 2009.

Plan-Related Information

- A plan administrator is not required by the regulation to separately "identify" the designated investment alternatives with respect to plan-related information and to "name" each designated investment alternative in the investment-related disclosure where both the plan-related information and investment-related disclosure is contained in the same document. In other words, the same information need not be provided twice. A plan administrator is permitted, however, to use multiple documents in disclosing the required information.

Disclosure of Administrative Expenses

- Sample descriptions of acceptable disclosures of administrative expenses are provided in the FAB.
- Administrative expenses paid entirely from a combination of forfeited amounts and plan sponsor assets need not be disclosed because no participant account is charged or reduced by the payment.
- Where an investment is denominated in participant accounts as shares or units, expenses paid by liquidating such shares or units credited to individual accounts must be disclosed as administrative expenses rather than being included in the total operating expenses of the investment.
- If all of a plan's administrative expenses are paid from revenue sharing from one or more designated investment alternatives, a description of the revenue sharing arrangement must still be provided, even if no fees or expenses are allocated directly to individual accounts.

2 *See* Treas. Reg. § 2550.408-2; 77 Fed. Reg. 5632 (Feb. 3, 2012).

Plan-Related Information for Brokerage Windows

- Plan-related information pertaining to brokerage windows should include how to give investment instructions, account balance requirements, restrictions on trading, how the window is different from the plan's designated investment alternatives, and a contact for questions.
- An explanation of fees and expenses that may be charged against the account of a participant on an individual basis, such as fees for investing in or liquidating an investment or failing to maintain a minimum account balance in a brokerage window must be provided, although plan administrators get a break from disclosing fees associated with investments available through the brokerage window. The FAB provides a general statement that plan administrators may use, stating that such investments may charge their own fees and expenses. The plan administrator must, however, provide a quarterly disclosure of amounts actually charged, along with a statement of the services provided.

Investment-Related Information

Generally

- Plan-related information pertaining to investments that are closed to new participant money must be disclosed, but investment-related disclosures are required only with respect to participants invested in such funds.

Website Address

- A plan administrator is permitted to contract with a third-party administrator or recordkeeper to have such administrator or recordkeepers establish a website address for the plan pertaining to investment-related expenses. In this regard, the plan administrator is not responsible for the accuracy of the information provided on a third-party website as long as the plan administrator reasonably and in good faith relies on the information provided by the service provider or issuer of a designated investment alternative.
- The guidance includes a detailed description of the return information and mid-year changes in fees and expenses for a plan's designated investment alternatives that must be made available on the website.

Glossary Requirement

- No model glossary of key terms to assist participants in understanding the disclosures was issued by the DOL; however, references to two available samples submitted to the DOL are provided.

Comparative Format

- Investment-related information may be disclosed in multiple charts or documents rather than one unified chart as long as the various charts and documents are furnished at the same time so as to allow a genuine comparison among designated investment alternatives.
- Changes to specific fee and expense information in the comparative chart do not require issuance of a new chart to participants more frequently than annually. As noted above, however, website information must be updated as soon as reasonably possible following a change.
- Performance and benchmark information of a designated investment alternative is required on a one-year, five-year and ten-year basis, or from the inception of the fund for designated investment alternatives that have been in existence for less than 10 years.
- Disclosures may be provided either as stand-alone documents or as part of other documents, such as a summary plan description or pension benefit statement, as long as the timing requirements of the regulation are met.
- Where a plan offers an investment platform consisting of a large number of registered mutual funds of multiple fund families into which participants may direct their accounts, the underlying funds themselves are not a designated investment alternative, unless the plan "specifically identifies" the underlying individual investment alternatives as available under the plan.
    - The rules are unclear for determining when and whether the plan must or should "specifically identify" the underlying investment alternatives as available.

- Pending further guidance, however, as a matter of enforcement policy, the DOL will not require that all of the investment alternatives comprising the platform be treated as designated investment alternatives if the plan administrator: (1) makes the required disclosures for at least three of the investment alternatives on the platform that collectively meet the "broad range" requirements under ERISA section 404(c); and (2) makes the required disclosures with respect to all other investment alternatives on the platform in which at least five participants, or, in the case of a plan with more than 500 participants, at least one percent of all participants are invested on a date not more than 90 days preceding each annual disclosure. For these purposes, the same investment alternatives subject to these disclosures can be used to satisfy both the "broad range" and one percent requirements.

- Special rules apply in calculating total annual operating expenses with respect to: (1) the underlying funds of a "fund of funds;" (2) a separately managed trust account; (3) the insurance element of a stable value fund, as well with respect to the frequency of calculating the net asset values during a year to come up with an average net asset value for the year.

404(c) Compliance

- The fiduciary of a 404(c) plan is not required to furnish participant fee disclosures before they must be furnished under the participant fee disclosure regulation, taking into account the transition rules published in the Federal Register in July 2011, in order to maintain 404(c) status.[3]

The Practical Impact of FAB 2012-02

The DOL has recognized the difficulty in making system and other changes to comply with FAB 2012-02 in time for the initial participant disclosures on August 30, 2012. As such, the DOL states in FAB 2012-02 that enforcement of the new guidance will generally be unnecessary as long as a plan administrator acts in "good faith" based upon a "reasonable" interpretation of the final regulations and has a future plan for complying with the guidance of FAB 2012-12.

What to Do Next

In preparation for the August 30, 2012 deadline, plan sponsors should take the following action:

- Contact third-party administrators to gauge any compliance efforts they may have implemented or can implement in time for the August 30 deadline;
- Review disclosures prepared by the plan's third-party administrator for compliance with the new rules;
- Contact investment managers for fee information and determine which documents prepared by the investment manager can be used for disclosure purposes; and
- Determine the appropriate delivery mechanism for delivering the disclosure.

To the extent disclosures will not be prepared by a plan's third-party administrator and/or recordkeeper, plan sponsors, with the help of third-party vendors and legal counsel, will need to assemble the information necessary to provide them. This will require the following action items:

- Identify the plan's "designated investment alternatives" as defined in the regulation and FAQs;
- Prepare or identify documents that provide the following annual plan-related disclosures:
    - An explanation of the circumstances under which participants may give investment instructions;
    - An explanation of any plan-specified limitations on such instructions, including any restrictions on transfer to or from a designated investment alternative (but not including limitations imposed at investment, fund, or portfolio level);
    - A description of or reference to plan provisions regarding voting, tender and similar rights appurtenant to an investment in a designated investment alternative, as well as any restrictions on such rights;

3 *See* 76 Fed. Reg. 42,539; 77 Fed. Reg. 5632 (July 19, 2011).

  - An identification of any designated investment alternatives offered under the plan;
  - An identification of any designated investment managers; and
  - A description of any "brokerage windows," "self-directed brokerage accounts," or similar plan arrangements that permit participants to select investments other than those designated by the plan.
- Estimate and prepare a disclosure for upcoming annual administrative expenses not related to investments that are paid directly from the plan and may be allocated to all participant accounts (*e.g.*, recordkeeping fees, estimated annual legal fees), but not including expenses contained in the disclosure of the annual operating percentage of the plan.
- Include an explanation of annual expenses offset by revenue sharing (*e.g.*, recordkeeping paid for by the funds' investment returns).
- Prepare a comparative chart showing investment fund performance over a one-year, five-year, and ten-year period and identifying the performance of appropriate benchmarks.
- Identify a website address to provide to participants for more information about investment funds.
- Prepare or identify a disclosure of how any brokerage window operates and any fees or expenses relating to getting into the brokerage window or maintaining eligibility.
- Include a glossary of terms, as applicable, and consider including a discussion of special rules for annuities, target date funds, and employer securities.
- Prepare for the quarterly disclosure of actual expenses.

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