

Fiduciaries will need to review fee disclosures under new DOL regulations

Fiduciaries of plans will need to carefully review fee-related information that they receive from service providers, pursuant to new U.S. Department of Labor regulations.

401(k) Participant Fee and Service Provider Disclosures

Beginning August 31, 2012, U.S. Department of Labor ("DOL") regulations under Section 404(a)(5) (the "Regulation") of the Employee Retirement Income Security Act of 1974, as amended ("ERISA") require fiduciaries of self-directed, individual account plans to provide participants with (i) quarterly statements regarding plan fees and expenses deducted from participant accounts, (ii) cost and other information about investments available under the plan and (iii) access to supplemental investment information. Such disclosures generally must use uniform methods to calculate expenses and return information, and must be presented in a format that makes it easy for participants to make comparisons among the investment alternatives.

Some of the more notable requirements include disclosure of:

Participant-account expenses. In general, participants must receive (i) an explanation of any fees related to the general administration of the plan that will be deducted from participant accounts, (ii) a description of any fees related to a participant-directed action (such as a loan, withdrawal or qualified domestic relations order), and (iii) the actual quarterly fees charged to individual accounts and a description of the services provided for that fee.

Investment-related expenses. For each investment alternative participants must be provided information regarding (i) the total expense as both a dollar amount and a percentage of assets expressed per \$1,000 invested, (ii) investment restrictions and redemption charges, and (iii) the performance data on the available investments and relevant benchmarks.

Format. Information must be provided in a comparative format (a chart or similar format that helps the participant compare the investments available). In particular, the design of the comparative document must facilitate a comparison of information for each designated investment alternative available under the plan, and must prominently display the date and include the following:

- The name, address, and telephone number of the plan administrator (or their delegate) to contact for the provision of information available upon request;
- A statement that additional investment-related information (including more recent performance data) may be available at the listed website; and
- A statement that explains how to request and obtain free paper copies of information provided on the website, special disclosures about annuities, and special disclosures relating to fixed return investments.

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A model chart is provided in the Regulation. Disclosures can be delivered electronically to participants.

Timing. The initial disclosures for calendar year plans must be furnished to current participants no later than August 31, 2012. Otherwise, both the participant-account and investment-related information must be provided before a participant's initial investment direction, and information must thereafter be provided either quarterly or annually (depending upon the type of information). The first quarterly statement under the rules for calendar-year plans, reflecting fees and expenses actually deducted from current participant or beneficiary accounts during the period from July through September 2012 is November 14, 2012.

Service Provider Disclosures to Fiduciaries

In addition, service providers to plans covered by ERISA generally are required by July 1, 2012 to provide information regarding direct and indirect fees earned by the service provider and its affiliates. There are certain exceptions to the disclosure requirements. There is no model form for such disclosures. A fiduciary must satisfy itself that it has received disclosure from all service providers required to provide such information, and the fiduciary must review and evaluate the information received in order to make determinations as to whether the fees, in the fiduciary's judgment, are reasonable. Payment of unreasonable fees would be a violation of the fiduciary's duties to the plan under Section 408(b)(2) of ERISA.

Important Actions

Fiduciaries will need to promptly consider and review the information received pursuant to Section 408(b)(2).

Although as a practical matter Plan fiduciaries will generally receive required tables and other information required to be provided to participants under Section 404(a)(5) from third party administrators and other service providers, the provision of the information to participants, as described above, is a fiduciary function. Failure to comply with the Regulation can result in the occurrence of a prohibited transaction and significant liabilities. Consequently, fiduciaries will need to carefully review all materials (including those received from third-party administrators) intended to be provided to participants.

If you would like our assistance in reviewing fee information obtained from service providers pursuant to Section 408(b)(2) or Section 404(a)(5), or if you have any questions regarding compliance with these rules, please contact your usual Clifford Chance contact or contact any of the authors of this memorandum listed.

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

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