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Department of Labor Proposed Fee Disclosure Requirements for Participant-Directed Individual Account Plans

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Introduction

- Background to proposed fee disclosure regulations
- Proposed disclosure requirements:
 - Plan-related information (including plan expenses)
 - Investment-related information
- Proposed change to 404(c) regulation
- Questions

Background to Proposed Regs

- Current wave of 401(k) fees litigation
 - Target = Fortune 200 companies
 - Failure to ensure reasonable fees, failure to investigate, failure to disclose
- Legislative initiatives
- Regulatory developments
 - Fee disclosure by service providers under § 408(b)(2) (proposed regs)
 - Changes to Form 5500 Schedule C (final)
 - DOL/SEC Memorandum of Understanding

Proposed Disclosure Requirements for Participant-Directed Individual Account Plans

Overview

- DOL's view: If participants make investment decisions, plan fiduciaries must ensure that **participants are provided sufficient information** regarding the plan, including its fees and expenses.
- ERISA **Section 404(c)** already requires certain disclosures in participant-directed plans.
- Proposed rules represent shift from 404(c) to requiring fee disclosure as **direct responsibility of fiduciary**.

Proposed Effective Date

- Once adopted as a final regulation, the disclosure requirements must be met for plan years beginning on or after January 1, 2009.

Required Disclosures Under Proposed Regulation

DOL divides into two categories:

1. “Plan-Related Information”
 - General plan information
 - Plan administrative expenses
 - Individual expenses
2. “Investment-Related Information”

Plan-Related Information

General Plan Information

General Plan Information that must be disclosed:

- How participants and beneficiaries may give investment instructions
- Any specified limitations on such instructions, including any restrictions on transfer to or from a designated investment alternative
- The exercise of voting, tender, and similar rights appurtenant to an investment in a designated investment alternative as well as any restrictions on such rights
- The specific designated investment alternatives offered under the plan
- The identity of any designated investment managers to whom participants and beneficiaries may give investment directions

Very similar to disclosures already required for 404(c) plans

When and How Does General Plan Information Have To Be Provided?

- **On or before the date** an individual becomes eligible to participate in the plan and at least **annually** thereafter.
 - Initial disclosure goes to employees.
- Notice of material changes must be provided not later than **30 days after such changes** are adopted.
- May make disclosures as part of SPD as long as timing requirements are met

Plan-Related Information

Administrative Expenses

- Most important component of proposed regs.
- Requires that participants receive information about plan fees and expenses at regular intervals.
- Two layers of disclosure:
 - When individual becomes eligible to participate in the plan, and at least annually thereafter
 - Quarterly

Plan-Related Information

Administrative Expenses

- Initial and Annual Disclosure:
 - “An explanation of any fees and expenses for plan administrative services (e.g., legal, accounting, recordkeeping) that, to the extent not otherwise included in investment-related fees and expenses, may be charged to the plan and the basis on which such charges will be allocated (e.g., pro rata, per capita) to, or affect the balance of, each individual account.”
 - Information may be disclosed in the plan’s summary plan description.

Plan-Related Information

Administrative Expenses

- Quarterly Disclosure:
 - “The dollar amount actually charged during the preceding quarter to the participant’s or beneficiary’s account for administrative services, and a description of the services provided . . . for such amount (e.g., recordkeeping).”
 - OK to identify total administrative fees and expenses assessed during the quarter with an indication that the charges include legal, accounting, and recordkeeping costs to the plan.
 - Not necessary to break out administrative charges on a service-by-service basis.
 - May be disclosed as part of a quarterly benefit statement.

Plan-Related Information

Individual Expenses

- Participants must receive information about expenses that are assessed **on an individual basis**, rather than plan-wide, such as fees related to QDROs, loans, and investment advice services.
- The timing of such disclosure tracks the administrative expenses rule:
 - Explanation of fees that may be charged to individual accounts at the time of plan eligibility and annually thereafter
 - Quarterly statement of amounts actually charged during the preceding quarter

Investment-Related Information

- The following information must be provided **automatically** to each participant with respect to each designated investment alternative in the plan:
 - The name and category of the investment alternative (e.g., money market mutual fund, balanced fund, or index fund, and whether the investment is actively or passively managed)
 - Internet address that will lead participants to supplemental information about the investment option
 - Average annual total return on the investment for one-year, five-year, and 10-year periods, if available

Investment-Related Information

- Performance data for “an appropriate broad-based benchmark” over time periods comparable to the performance data periods
- Fees and expenses related to the purchase, holding, and sale of the investment alternative, including:
 - shareholder-type fees charged directly against the investment, such as sales loads, sales charges, and redemption fees; and
 - total annual operating expenses expressed as a percentage (i.e., expense ratio)

Investment-Related Information

- Points to Consider:
 - “Designated investment alternative” does not include a brokerage window, self-directed brokerage account, or similar plan arrangement that enables a participant to select investments beyond those designated by the plan.
 - Disclosure **must** be in a chart or similar format that will permit comparison
 - May use most recent fund prospectus or disclosure if it contains all required information

Investment-Related Information

DOL's Model Comparative Chart

I. Performance Information

Name/ Type of Option	Mgmt.	Fixed Return/ Term	Average Annual Total Return as of 12/31/0X			Benchmark/Index as of 12/31/0X		
			1yr.	5yr.	10yr.	1yr.	5yr.	10yr.
Stock Funds								
A Fund/S&P 500 Index www.Web site.com	Passive	NA	15.6%	6.1%	8.3%	15.8%	6.2%	8.4%
						S&P 500		
B Fund/Large Cap www.Web site.com	Active	NA	8.9%	.22%	NA	-8.9%	5.9%	12.2%
						Russell 1000		
C Fund/Int'l Stock www.Web site.com	Active	NA	4.3%	5.2%	11.2%	26.9%	15.4%	8.1%
						MSCI EAFE		
D Fund/Mid Cap ETF www.Web site.com	Passive	NA	15%	12.7%	11.4%	15%	13%	12%
						Russell Midcap		
Bond Funds								
E Fund/Bond Index www.Web site.com	Passive	NA	4.3%	5.2%	6.2%	4.3%	5.1%	6.2%
						LBA U.S. Aggr. Bd.		
Other								
F Fund/ GICs www.Web site.com	Active	NA	4.7%	4.4%	5%	5%	3%	3.8%
						US 91 Day T Bill		
G Fund/Stable Value www.Web site.com	Active	NA	4.3%	4.0%	4.9%	4.7%	3.4%	4.3%
						Treasury CM		
H 200X GIC www.Web site.com	NA	4% 2 yr.	NA	NA	NA	NA		

Investment-Related Information

DOL's Model Comparative Chart

II. Fees and Expense Information

Name/ Type of Option	Total Annual Operating Expenses *	Shareholder/Shareholder-type Fees **
Stock Funds		
A Fund / S&P 500 Index	0.18%	\$20 annual service fee assessed for accounts holding less than \$10,000. May be waived in certain circumstances.
B Fund / Large Cap	2.45%	4.25% deferred sales charge against amounts redeemed within 12 months of purchase.
C Fund/International Stock	0.79%	5.75% sales charge against amounts invested.
D Fund/ Mid Cap ETF	0.20%	4.25% sales charge against amounts invested or redeemed.
Bond Funds		
E Fund/ Bond Index	0.50%	N/A
Other		
F Fund/ GICs	0.46%	10% charge against amounts withdrawn within 18 mos. of initial investment.
G Fund/ Stable Value	0.65%	Dollars withdrawn may not be transferred to a competing fund for 90 days after withdrawal.
H 200X GIC	NA	12% charge against amounts withdrawn before maturity.

Proposed Amendments to Section 404(c) Regulation

Proposed Amendments to Section 404(c) Regulation

- ERISA Section 404(c): relieves fiduciaries of liability for investment losses that result from a participant's exercise of control over assets.
- Proposed changes would:
 - integrate disclosure requirements under 404(c) and 404(a), and
 - “reiterate” DOL’s position that the Section 404(c) relief does not extend to a fiduciary’s duty to prudently select and monitor investment funds under the plan.

Proposed Regs vs. 404(c) Regs

SIDE-BY-SIDE COMPARISON OF PROPOSED DISCLOSURE REGULATIONS AND EXISTING REQUIREMENTS UNDER SECTION 404(C) REGULATIONS

Disclosure Requirement	Proposed Regs	404(c) Regs
How participants and beneficiaries may give investment instructions	Yes	Yes
Any specified limitations on such instructions, including any restrictions on transfer to or from a designated investment alternative	Yes	Yes
The exercise of voting, tender, and similar rights appurtenant to an investment in a designated investment alternative as well as any restrictions on such rights	Yes	Yes
The specific designated investment alternatives offered under the plan	Yes	Yes
The identity of any designated investment managers to whom participants and beneficiaries may give investment directions	Yes	Yes
An explanation of any fees and expenses for plan administrative services (<i>e.g.</i> , legal, accounting, recordkeeping) that, to the extent not otherwise included in investment-related fees and expenses, may be charged to the plan and the basis on which such charges will be allocated (<i>e.g.</i> , pro rata, per capita) to, or affect the balance of, each individual account	Yes	No
Quarterly statement of the dollar amount actually charged during the preceding quarter to the participant's or beneficiary's account for administrative services, and a description of the services provided for such amount (<i>e.g.</i> , recordkeeping)	Yes	No
Information about expenses that are assessed on an individual basis, rather than plan-wide, such as fees related to QDROs, loans, and investment advice services	Yes	No
The name and category of each designated investment alternative (<i>e.g.</i> , money market mutual fund, balanced fund, index fund, and whether the investment is actively or passively managed)	Yes	Yes
Internet address that will lead participants to supplemental information about the investment option	Yes	No
General description of the investment objectives and risk and return characteristics of each designated investment alternative	No	Yes

Proposed Regs vs. 404(c) Regs

Disclosure Requirement	Proposed Regs	404(c) Regs
Average annual total return on the investment for one-year, five-year, and 10-year periods, if available	Yes	No
Performance data for “an appropriate broad-based benchmark” over time periods comparable to the performance data periods	Yes	No
Shareholder-type fees charged directly against the investment, such as sales loads, sales charges, and redemption fees	Yes	Yes
Total annual operating expenses of the investment alternative	Yes	Yes – upon request
Explanation that the plan is intended to be a 404(c) plan and that the fiduciaries may be relieved of liability for any losses which are the direct and necessary result of investment instructions given by such participants or beneficiaries	No	Yes
The name, address, and phone number of the plan fiduciary responsible for providing, upon a participant’s request and a description of the information that can be obtained on request	No	Yes
For employer stock, a description of the procedures established to provide for the confidentiality of information relating to employer securities, and the name, address and phone number of the plan fiduciary responsible for monitoring compliance with the procedures	No	Yes
For funds subject to the 1933 Securities Act, a copy of the most recent prospectus, either immediately before or immediately after participant makes the investment	No	Yes
Copies of prospectuses, financial statements and reports, and any other materials relating to the investment alternatives available under the plan	No	Yes – upon request
List of assets in the portfolio of each investment alternative, their value (or percentage of fund it represents), and for fixed rate contracts, name of bank, savings and loan or insurance contract, term and rate of return of the contract	No	Yes – upon request
Information concerning the value of shares or units in the available investment alternatives	No	Yes – upon request
The value of the shares or units in the investment fund held in the P’s account	No	Yes – upon request

Questions?

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