

## **Department of Labor Proposes New Fee Disclosure Requirements for Participant-Directed Individual Account Plans**

**July 28, 2008**

On July 23, the Department of Labor (DOL) released proposed regulations that would, if adopted, impose new requirements for the disclosure of fee and expense information to participants in self-directed individual account plans (such as 401(k) plans). The proposed rule would be effective for plan years beginning on or after January 1, 2009 and is part of an ongoing effort by DOL to ensure that participants receive sufficient information about plan fees and expenses so that they can make informed investment decisions. In the same notice, DOL proposed changes to the regulations under Section 404(c) of the Employee Retirement Income Security Act (ERISA) to integrate the disclosure requirements and to restate DOL's position with respect to the scope of ERISA Section 404(c)'s protection. DOL has requested written comments on the proposed regulations by September 8, 2008.

### **Background**

Under ERISA, the investment of plan assets is governed by the fiduciary standards set forth in ERISA Section 404(a)(1)(A) and (B), which require fiduciaries to act prudently and solely in the interest of the plan's participants and beneficiaries. If a plan assigns investment responsibilities to plan participants, it is DOL's view that plan fiduciaries must take steps to ensure that participants are provided sufficient information regarding the plan, including its fees and expenses, to make informed decisions about the management of their individual accounts. To some extent, even prior to the effective date of the proposed regulations, such disclosure is already required by plans that elect to comply with the requirements of ERISA Section 404(c). The proposed regulations come at a time when DOL is still considering rules that would apply new disclosure requirements to contracts between plans and service providers under ERISA Section 408(b)(2). (For more details, see our LawFlash issued December 20, 2007: [http://www.morganlewis.com/pubs/EB\\_Form5500\\_ERISA408\(b\)\(2\)\\_LF\\_20dec07.pdf](http://www.morganlewis.com/pubs/EB_Form5500_ERISA408(b)(2)_LF_20dec07.pdf).)

### **Overview of Proposed Section 2550.404a-5 Regulation**

Under the proposed rule, fiduciaries of a participant-directed individual account plan, such as a 401(k) or profit-sharing plan, must take steps to ensure that participants receive certain information at the time they first invest and on a periodic basis. The information that must be disclosed falls into two categories: (1) plan-related information and (2) investment-related information.

## *Plan-Related Information*

Plan-related information encompasses general information about the plan as well as specific information about the administrative expenses charged to the plan and to individual participant accounts.

**General Plan Information.** For plans that have already elected ERISA Section 404(c) compliance, the list of general plan information that must be disclosed should look familiar:

- 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.

This information must be furnished to an employee on or before the date he or she becomes eligible to participate in the plan and at least annually thereafter. In addition, the proposal requires that participants be furnished a description of any material changes to the required information not later than 30 days after such changes are adopted.

**Information About Plan Administrative Expenses.** The most important feature of the proposed regulation is the requirement that participants receive information about plan fees and expenses at regular intervals. If adopted, this new rule will impose significant new disclosure obligations on plan sponsors, and consideration should now be given to how each plan will be able to implement these requirements consistent with the 2009 proposed effective date. At the time an employee becomes eligible to participate in the plan, and at least annually thereafter, he or she must receive an explanation of any fees and expenses for plan administrative services (e.g., legal, accounting, recordkeeping) that may be charged to the plan and the basis (e.g., pro rata, per capita) on which such charges will be allocated to, or affect the balance of, each individual account. The information may be disclosed in the plan's summary plan description.

In addition, each participant must receive, at least quarterly, a statement of the dollar amounts actually charged during the preceding quarter to the participant's account for administrative services, and a general description of the services to which the charges relate. The preamble to the new regulation indicates that it would be sufficient to identify "the total administrative fees and expenses assessed during the quarter with, for example, an indication that the charges for plan administrative expenses include legal, accounting, and recordkeeping costs to the plan." Importantly, administrative expenses may be disclosed on an aggregate or summary basis; thus, it is not necessary to break out administrative charges on a service-by-service basis. The quarterly fee information may be disclosed as part of a quarterly benefit statement.

**Information About Individual Expenses.** Finally, participants must receive information about expenses that are assessed on an individual basis, rather than planwide, such as fees related to QDROs, loans, and investment advice services. The timing of such disclosure tracks the administrative expenses rule: the fiduciary must provide an explanation of fees that may be charged to individual accounts at the time of plan eligibility and annually thereafter, and must provide a quarterly statement of amounts actually charged during the preceding quarter.

## ***Investment-Related Information***

The proposal also establishes rules for disclosing investment-related information to participants in self-directed individual account plans. The following information must be provided automatically to each participant with respect to each investment option in the plan (other than a brokerage window, self-directed brokerage account, or similar plan arrangement that enables a participant to select investments beyond those designated by the plan):

- The name and category of the investment alternative (e.g., money market mutual fund, balanced fund, index fund, and whether the investment is actively or passively managed) and an 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
- 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 (a) shareholder-type fees charged directly against the investment, such as sales loads, sales charges, and redemption fees; and (b) total annual operating expenses expressed as a percentage (i.e., expense ratio)

The proposed rule includes a suggested format for presenting the information *See* 73 Fed. Reg. 43042-43 (July 23, 2008). This suggested format can be accessed at <http://morganlewis.com/documents/ModelComparativeChart-FeeRegs.pdf>.

Investment-related information must be provided to each participant on or before the date of plan eligibility and at least annually thereafter. The preamble states that a plan fiduciary may satisfy this requirement by providing the most recent annual disclosure for the investment (such as a mutual fund annual report).

## **Overview of Proposed Amendments to Section 2550.404c-1 Regulation**

Also included in the DOL proposal are amendments to the regulation under Section 404(c) of ERISA. ERISA Section 404(c) relieves fiduciaries of liability for investment losses that result from a participant’s exercise of control over assets. However, DOL has taken the position that the relief afforded by ERISA Section 404(c) and the regulations issued thereunder does not extend to a fiduciary’s duty to prudently select and monitor investment funds under the plan. The courts are split as to whether DOL’s interpretation of the statute is correct. In the proposed rule, DOL seeks to amend the Section 404(c) regulation to reflect its position on this issue.

## **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.

Please contact any of the following Morgan Lewis attorneys for more information about the issues discussed in this Morgan Lewis LawFlash:

**Chicago**

Sari M. Alamuddin	312.324.1158	<a href="mailto:salamuddin@morganlewis.com">salamuddin@morganlewis.com</a>
Charles C. Jackson	312.324.1156	<a href="mailto:charles.jackson@morganlewis.com">charles.jackson@morganlewis.com</a>
Louis L. Joseph	312.324.1726	<a href="mailto:louis.joseph@morganlewis.com">louis.joseph@morganlewis.com</a>

**Dallas**

Riva Johnson	214.466.4107	<a href="mailto:riva.johnson@morganlewis.com">riva.johnson@morganlewis.com</a>
Ronald E. Manthey	214.466.4111	<a href="mailto:ron.manthey@morganlewis.com">ron.manthey@morganlewis.com</a>
Ellen L. Perlioni	214.466.4142	<a href="mailto:ellen.perlioni@morganlewis.com">ellen.perlioni@morganlewis.com</a>
Heath Miller	214.466.4118	<a href="mailto:hmillier@morganlewis.com">hmillier@morganlewis.com</a>

**New York**

Craig A. Bitman	212.309.7190	<a href="mailto:cbitman@morganlewis.com">cbitman@morganlewis.com</a>
-----------------	--------------	--

**Philadelphia**

Robert L. Abramowitz	215.963.4811	<a href="mailto:r Abramowitz@morganlewis.com">rabramowitz@morganlewis.com</a>
Jeremy P. Blumenfeld	215.963.5258	<a href="mailto:jblumenfeld@morganlewis.com">jblumenfeld@morganlewis.com</a>
Joseph J. Costello	215.963.5295	<a href="mailto:jcostello@morganlewis.com">jcostello@morganlewis.com</a>
I. Lee Falk	215.963.5616	<a href="mailto:ilfalk@morganlewis.com">ilfalk@morganlewis.com</a>
Vivian S. McCardell	215.963.5810	<a href="mailto:vmccardell@morganlewis.com">vmccardell@morganlewis.com</a>
Brian T. Ortelere	215.963.5150	<a href="mailto:bortelere@morganlewis.com">bortelere@morganlewis.com</a>
Steven D. Spencer	215.963.5714	<a href="mailto:sspencer@morganlewis.com">sspencer@morganlewis.com</a>
Marianne R. Yudes	215.963.5490	<a href="mailto:myudes@morganlewis.com">myudes@morganlewis.com</a>
David B. Zelikoff	215.963.5360	<a href="mailto:dzelikoff@morganlewis.com">dzelikoff@morganlewis.com</a>

**Pittsburgh**

John G. Ferreira	412.560.3350	<a href="mailto:jferreira@morganlewis.com">jferreira@morganlewis.com</a>
Lauren Bradbury Licastro	412.560.3383	<a href="mailto:llicastro@morganlewis.com">llicastro@morganlewis.com</a>
R. Randall Tracht	412.560.3352	<a href="mailto:rtracht@morganlewis.com">rtracht@morganlewis.com</a>

**San Francisco**

D. Ward Kallstrom	415.442.1308	<a href="mailto:dwkallstrom@morganlewis.com">dwkallstrom@morganlewis.com</a>
-------------------	--------------	--

**Washington, D.C.**

Gregory C. Braden	202.739.5217	<a href="mailto:gbraden@morganlewis.com">gbraden@morganlewis.com</a>
Donald L. Havermann	202.739.5072	<a href="mailto:dhavermann@morganlewis.com">dhavermann@morganlewis.com</a>
Stuart P. Kasiskie	202.739.6368	<a href="mailto:skasiskie@morganlewis.com">skasiskie@morganlewis.com</a>
Daniel R. Kleinman	202.739.5143	<a href="mailto:dkleinman@morganlewis.com">dkleinman@morganlewis.com</a>
Gregory L. Needles	202.739.5448	<a href="mailto:gneedles@morganlewis.com">gneedles@morganlewis.com</a>
Christopher A. Weals	202.739.5350	<a href="mailto:cweals@morganlewis.com">cweals@morganlewis.com</a>

**About Morgan, Lewis & Bockius LLP**

Morgan Lewis is a global law firm with more than 1,400 lawyers in 22 offices located in Beijing, Boston, Brussels, Chicago, Dallas, Frankfurt, Harrisburg, Houston, Irvine, London, Los Angeles, Miami, Minneapolis, New York, Palo Alto, Paris, Philadelphia, Pittsburgh, Princeton, San Francisco, Tokyo, and Washington, D.C. For more information about Morgan Lewis or its practices, please visit us online at [www.morganlewis.com](http://www.morganlewis.com).

## **IRS Circular 230 Disclosure**

To ensure compliance with requirements imposed by the IRS, we inform you that any U.S. federal tax advice contained in this communication (including any attachments) is not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any transaction or matter addressed herein. For information about why we are required to include this legend in emails, please see <http://www.morganlewis.com/circular230>.

This LawFlash is provided as a general informational service to clients and friends of Morgan, Lewis & Bockius LLP. It should not be construed as, and does not constitute, legal advice on any specific matter, nor does this message create an attorney-client relationship. These materials may be considered **Attorney Advertising** in some states. Please note that the prior results discussed in the material do not guarantee similar outcomes.

**© 2008 Morgan, Lewis & Bockius LLP. All Rights Reserved.**

