



## Legal Alert: 401(k) Fee-Transparency and Disclosure Rule Published

10/21/2010

The Department of Labor (DOL) has published a final rule setting forth the responsibilities of plan administrators to disclose certain information, including information regarding fees and expenses, to participants and beneficiaries in participant-directed individual account plans, including most 401(k) plans. The final rule was published in the October 20, 2010 Federal Register. Although the rule takes effect December 20, 2010, it is not applicable to a plan until its first plan year beginning on or after November 1, 2011. For calendar year plans, that would be January 1, 2012.

The rule was issued to ensure that plan participants are aware of their rights and responsibilities with respect to managing their individual plan accounts and are provided sufficient information regarding the plan and designated investment alternatives to make informed decisions about the management of their individual accounts. The new requirements are fiduciary requirements, with which a fiduciary must comply in order to satisfy its obligation to invest plan assets prudently and in the interests of participants and beneficiaries when the authority to direct investments has been delegated to those participants and beneficiaries. Failure to comply will constitute a breach of fiduciary duty, whether or not the plan otherwise complies with section 404(c) of ERISA.

**Who Must Provide the Disclosures?** The plan administrator is responsible for providing the disclosures.

**Who Must Receive the Disclosures?** Disclosures must be made to all employees who are eligible to participate in the plan, regardless of whether the employee is actually enrolled in the plan. Beneficiaries are also entitled to disclosure if they have the right to direct the investment of the assets held in a plan account (such as due to the death of a participant or pursuant to a qualified domestic relations order).

**What Types of Information Must be Provided?** Participants and beneficiaries must receive various items of both plan-related information and investment-related information. The required disclosures must be based on the latest information available to the plan.

**1. Plan-Related Information.** Three types of plan-related information must be disclosed:

- *General Operational and Identification Information.* This includes information about the structure and mechanics of the plan, such as when, and the circumstances under which, participants and beneficiaries can give

investment instructions, a current list of the plan's investment options and any "brokerage windows" or similar arrangements that permit the selection of investments beyond those specifically designated by the plan.

- *Administrative Expenses.* This includes an explanation of any fees and expenses for general plan administrative services (e.g., legal, accounting, recordkeeping), which may be charged against the individual accounts of all participants and beneficiaries and are not reflected in the total annual operating expenses of any designated investment alternative.
- *Individual Expenses.* An explanation of any fees and expenses that may be charged against an account on an individual instead of a plan-wide basis (for example, fees related to the processing of plan loans or qualified domestic relations orders, fees for investment advice, fees for brokerage windows, etc.)

The three types of information discussed above must be provided to participants and beneficiaries on or before the date they are first able to direct investments, and annually thereafter. Additionally, participants and beneficiaries must receive statements, at least quarterly, showing the amounts of the fees and expenses actually charged during the preceding quarter to their account for individual services and a description of the services to which the charges relate (for example, loan processing fee). This may be included on regular quarterly account statements that are otherwise furnished to the participant or beneficiary, or on a separate statement.

Any changes that are made to this plan-related information must be disclosed to participants and beneficiaries between 30 and 90 days in advance of the change.

**2. Investment-Related Information.** The plan administrator must also furnish several types of investment-related information, including:

- *Identifying Information.* This includes the name of each designated investment alternative and the type or category of the investment (such as money market fund, balanced fund, target-date fund, etc.)
- *Performance Data.* For investment alternatives that do not have a fixed rate of return, the average annual total returns of the investment for 1-, 5-, and 10-calendar year periods (or for the life of the alternative, if shorter) ending with the most recently completed calendar year, and a statement indicating that an investment's past performance is not necessarily an indication of how the investment will perform in the future. For investment alternatives with a fixed rate of return, both the rate of return and the term of the investment must be disclosed. If the issuer reserves the right to adjust the rate of return, the current rate of return must be provided as well as the minimum rate guaranteed under the contract (if any) and a statement advising the participant or beneficiary that the issuer may adjust the rate of return prospectively and how to obtain the most recent information regarding rate of return.
- *Benchmarks.* For investment alternatives without a fixed rate of return, the name and returns of an appropriate broad-based securities market index over the 1-, 5-, and 10-year periods (or for the life of the alternative, if shorter) matching the performance data periods. This information does not have to be provided with regard to investment alternatives with a fixed rate

of return.

- *Fee and Expense Information.* For investment alternatives that do not have a fixed rate of return: the amount and a description of each shareholder-type fee and a description of any restriction or limitation applicable to the purchase, transfer, or withdrawal of the investment in whole or in part, as well as the total annual operating expenses of the investment alternative expressed as a percentage (i.e. expense ratio); and the total annual operating expenses of the investment for a one-year period expressed as a dollar amount for each \$1,000 investment. For investment alternatives with a fixed rate of return, the amount and description of any shareholder-type fees 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.
- *Internet Web Site Address.* The address of an internet web site that contains sufficiently specific information about the investment option(s) that participants and beneficiaries may access to obtain more or more current information, including information on investment objectives and strategies, portfolio turnover, and other specific data regarding the investment.
- *Glossary.* A glossary of terms that will assist participants and beneficiaries in understanding the designated investment alternatives, or the address of an internet web site that provides access to such a glossary, along with a general explanation of the purpose for which the address is being furnished.

Investment-related information must be furnished on or before the first date participants and beneficiaries can actually make investment directions and annually thereafter. The new regulation also requires that investment-related information be furnished in a "comparative format," such as a chart, that enables participants and beneficiaries to easily compare the investment alternatives. The final rule includes a model comparative chart that the plan administrator can use to satisfy the comparative format requirement. A copy of this chart is available on the DOL's web site at: <http://www.dol.gov/ebsa/> (click on the link for model chart). The DOL's fact sheet explaining the new regulation is also available on this site, as well as a link to the regulation itself.

### ***Additional Requirements.***

Plan administrators are permitted to rely upon information that is provided to them by service providers in furnishing the required disclosures to participants and beneficiaries; however, that reliance must be "reasonable" and "in good faith." Independent of the new required disclosure, participants and beneficiaries also remain entitled to receive any information received by the plan regarding voting rights, tender offers, etc. and are entitled to request prospectuses and other information relating to particular investment alternatives.

### **Bottom Line:**

Plan administrators' jobs have become significantly more complex, and this new disclosure requirement, once it becomes fully applicable, will not change that trend. It also requires that plan administrators be satisfied that they can rely upon disclosures that investment managers and other service providers make to *them*. Hopefully, the requirements will combine and accomplish their intended purpose – to enable plan participants and

beneficiaries to be able to compare investments and make informed investment decisions.

If you have any questions regarding the new regulation or the information you are required to provide to comply with the regulation please contact Jeffrey Ashendorf, [jashendorf@fordharrison.com](mailto:jashendorf@fordharrison.com), any member of Ford & Harrison's Employee Benefits Practice Group or the Ford & Harrison attorney with whom you usually work.