

Phase Three--Disclosure in Retirement Plans

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The Department of Labor (DOL) has completed its three-pronged approach to requiring more disclosure and transparency of fees and other expenses related to retirement plan administration and investments.

First came service provider fee disclosure for large plans (100 or more participants) on Form 5500 Schedule C, now in effect. In the second, effective in 2011, the DOL requires service providers generally to disclose fees, related costs and conflicts of interest to plan fiduciaries. Now, final regulations require disclosure of fee and expense information to participants and beneficiaries in 401(k), ERISA 403(b) and other plans that allow participant investment directions. These regulations do not apply to plans that don't permit participant directions or to governmental and non-electing church plans or IRA-based plans such as SEPs and SIMPLE IRAs. The regulations are effective for plan years beginning after October 31, 2011.

The new disclosure regulations are extensive. Compliance will require significant efforts.

Responsibility

The final disclosure guidance clarifies that it is the plan administrator that must provide the required information. However, the regulations also make clear that to the extent the plan administrator relies reasonably and in good faith on information from an investment issuer or other service provider in making the required disclosures, the administrator will not be responsible for any resulting inadequacy or inaccuracy.

Timing

Participants and beneficiaries must receive the information before becoming eligible to direct investments (or within 60 days after the plan is subject to the rules), and, except as noted below for certain quarterly requirements, at least annually thereafter. A description of any "material" changes to the required information must be furnished 30 to 90 days in advance of the effective date of the change. New participants and beneficiaries during any annual disclosure period must receive the most recent disclosure information and all subsequent updates that have been provided.

Plan Information

Both plan and investment information must be provided to each eligible participant, whether or not actively participating, and to each beneficiary, including an alternate payee under a divorce order, who actually has a plan account. The plan-related information is as follows:

General Operational and Identification Information:

- An explanation of the circumstances under which participants and beneficiaries may give investment instructions and any applicable limitations, including any restrictions on transfer to or from an investment alternative.
- Identification of all investment alternatives and any designated investment managers under the plan.
- An explanation of the exercise of voting, tender offer and similar rights related to a designated investment alternative, as well as any applicable restrictions.
- A description of brokerage windows, self-directed brokerage accounts and similar arrangements allowing designation of investments outside of the plan menu, including fees and expenses associated with those arrangements.

General Administrative Expenses

- An explanation of the amount and allocation of fees and expenses for general plan administrative services (such as legal, accounting or recordkeeping services) that may be deducted from all individual accounts. Fees and expenses paid through revenue sharing from each investment alternative also must be disclosed.
- An itemized explanation of the general fees and expenses that have been actually charged to the participant or beneficiary.

Individual Expenses

- The amount and basis for any individual (as distinguished from plan-wide) fees and expenses charged to the account. Examples are fees for processing a loan or a domestic relations order, fees for investment advice and front or back-end loads or sales charges.

The information about both plan-wide and individual charges to an account must be disclosed **at least** quarterly.

Investment Information

The following investment information must be provided in a comparative format:

- The name and the type or category (generally as classified by the issuer) of each investment alternative.
- Performance data for each investment alternative that does not have a fixed return, including the average annual total return for one, five and ten-calendar year periods (or life of the fund if shorter) and comparable benchmark returns. This information must be accompanied by a statement that past performance is not necessarily an indication of future results.
- A description and the amount of each shareholder-type fee such as commissions and sales loads.
- The operating expenses expressed as a percentage (expense ratio) and a dollar amount for each \$1,000 invested.

- Applicable purchase or withdrawal restrictions and costs.
- A link to an internet web site providing investment information for each investment alternative including the name of the issuer and a description of the objectives and goals and the principal strategies and risks, as well as a general description of assets held and the portfolio turnover rate.
- Statements that fees and expenses are only one of several factors to be considered in making investment decisions and that the cumulative effect of fees and expenses can be substantial, with a reference to more information on the DOL web site.
- A glossary of financial and investment terms.

To facilitate presentation on a comparative basis, the DOL has provided a model chart. View the complete model chart [here](#).

Other Materials

When requested, prospectuses, financial reports, asset lists and valuation information for each investment alternative must be provided under the plan. For actual investments, materials on voting, tender and similar rights must be provided. Special rules apply with respect to employer securities, fixed return investments and annuity options.

Delivery Methods

The initial and annual disclosures may be included in a summary plan description or a benefit statement. Required quarterly information may be provided as part of a quarterly benefit statement. ERISA delivery rules, including current safe harbor electronic methods, apply.

ERISA Section 404(c) Plans

The new disclosure requirements are imposed as a general fiduciary responsibility. They are similar to but significantly more extensive than the disclosure requirements currently applicable to plans intending to qualify for the fiduciary liability exemption provided in Section 404(c) of ERISA. The new final regulations also amend the Section 404(c) regulations so that the requirements are consistent for the future. The DOL reiterates its position that compliance with Section 404(c) does not relieve a fiduciary from the duty to prudently select and monitor any investment alternative or investment manager or other service provider.

Conclusion

The DOL estimates that this regulation will impact 72 million participants in 483,000 plans with total assets of nearly three trillion dollars. Contact George Whitfield or any other member of Employee Benefits and Executive Compensation Practice Group at Warner Norcross & Judd for advice on the legal requirements and other help with the process.