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# DOL Issues Field Assistance Bulletin on Participant-Level Disclosure Rules

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On May 7, 2012, the Department of Labor ("DOL") issued Field Assistance Bulletin 2012 02 (the "FAB"), which consists of 38 FAQs relating to the DOL's final participant-level disclosure regulations under Section 404 of the Employee Retirement Income Security Act ("ERISA").[1] As indicated in our May 9, 2012 E Flash, which touched on some of the FAQs in the FAB, this alert is intended to provide a detailed discussion of the main topics addressed in the FAB.

The final participant-level disclosure regulations, published in October 2010, require plan administrators to disclose certain plan- and investment-related information to participants and beneficiaries (hereinafter referred to as "participants") in participant-directed individual account plans, such as 401(k) plans. The regulations require participants be furnished with (i) basic information about plan investments, including investment costs, prior to their initial plan investment and at least annually thereafter, and (ii) quarterly statements of plan fees and expenses deducted from their accounts. (Please see our November 4, 2010 E Flash, which describes the information that must be included in these initial/annual and quarterly disclosures.) For calendar year plans, the first initial/annual disclosures must be furnished by August 30, 2012, while the first quarterly disclosures must be furnished by November 14, 2012.

The FAB supplements the participant-level disclosure regulation by providing guidance on some of the most frequently asked questions posed to the DOL concerning the regulation and how it may be implemented. The key issues discussed in the FAB are summarized below.

**Plan Administrative Expense Disclosures**

Where the fees for a given service are known at the time of the disclosure, the explanation must clearly identify the service, the cost of the service, and the plan's method for allocating such cost. However, when services, fees or both are not known at the time of the disclosure, the required explanation must reasonably take into account the known facts and circumstances. For example, if a plan administrator reasonably expects the plan to incur legal fees in the upcoming year (*e.g.*, for legal compliance services), but does not know the exact amount of those fees at the time of the disclosure, identifying the services expected to be performed and the allocation method ordinarily used would be sufficient.

Payment of plan administrative expenses from a plan's forfeiture account or by the plan sponsor does not need to be disclosed as plan administrative expenses.

If the plan document provides that administrative expenses may be paid from either (i) individual accounts, (ii) plan forfeitures, or (iii) the general assets of the plan sponsor (at the

discretion of the plan administrator) but individual accounts have never been charged, the plan administrator does not intend to do so in the foreseeable future and the plan sponsor has made a written commitment to pay any expenses not covered by plan forfeitures, the plan's administrative expenses do not need to be disclosed. However, if it were possible for participant accounts to be charged (*e.g.*, the plan sponsor has not committed to pay expenses not covered by forfeitures), the plan's administrative expenses would need to be disclosed to participants.

The required disclosures may be furnished as stand-alone documents or along with, or as part of, other documents.

**Investment Performance and Expense Disclosures**

Where a plan offers an investment platform consisting of numerous mutual funds of multiple fund families without the plan's fiduciary designating any of the funds as a designated investment alternative ("DIA") under the plan, the platform itself is not a DIA; however, the failure to designate a manageable number of funds as DIAs raises questions as to whether the plan's fiduciary has satisfied its fiduciary duties under Section 404 of ERISA. Pending further guidance in this area, if a platform consists of more than 25 investment alternatives, each alternative does not need to be treated as a DIA, if the plan administrator: (i) makes required disclosures for at least three of the platform's investment alternatives that collectively meet the "broad range" requirements in the regulations under ERISA Section 404(c); and (ii) makes required disclosures for the platform's remaining investment alternatives in which a minimum number of participants are invested. Additionally, if a "significant" number of participants select a non-designated alternative through a brokerage window or similar arrangement, the plan's fiduciary has an obligation to determine whether such non-designated alternative should be treated as a DIA.

A model portfolio consisting of two or more of the plan's DIAs is not a DIA for which a disclosure must be provided if the model portfolio is clearly presented to plan participants as merely a means of allocating assets among specific plan DIAs. (The plan administrator also must clearly explain how the model portfolio differs from the plan's DIAs.) However, if, in selecting a model portfolio, participants acquire interests in an equity security, a unit participation, or a similar interest in an entity, that model portfolio would ordinarily be a DIA for which a disclosure must be provided. Also, if the plan offers only model portfolios made up of investments not separately designated under the plan, each model would be treated as a DIA.

The comparative chart of total return data may include more recent one-, five- and 10-year periods than the most recent calendar year end. However, to ensure appropriate comparability among all of the plan's DIAs, the stated performance period should ordinarily be the same for all of the plan's DIAs and benchmarks.

If there is a change to the fee and expense information for a plan's DIA after a comparative chart has been issued, the plan administrator is not required to issue an updated chart or disclosure before the next annual disclosure. However, the fee and expense information for the DIA included on the plan's website must be updated as soon as reasonably possible following the change, and the website should reflect the date on which it was most recently updated.

A plan administrator may furnish either a single, unified comparative chart or multiple charts supplied by the plan's service providers or DIA issuers, as long as the multiple charts are furnished at the same time and the charts are designed to facilitate a comparison among all of the plan's DIAs.

Information on DIAs closed to new investments still must be included in a plan's initial/annual disclosures.

**Revenue Sharing**

The quarterly revenue sharing explanation, which is required when some of a plan's administrative expenses are paid from the operating expenses of one or more of the plan's DIAs, does not require the itemization or identification of the specific plan administrative expenses being paid from the DIAs' annual operating expenses. A statement that some or all of the plan's administrative expenses are paid indirectly through some or all of the plan's DIAs is sufficient; however, a more detailed explanation, identifying the specific administrative expense or expenses being underwritten or an identification of the specific DIAs from which the payment is being made, is permitted.

Where all of a plan's administrative expenses are paid from revenue sharing received by the plan from one or more of the plan's DIAs, the required revenue sharing explanation must still be furnished to participants in/with the quarterly disclosure statement. The purpose of the revenue sharing explanation is to inform participants of plans that pay for some or all administrative services through investment-related charges, so that they do not think there are few or no administrative expenses associated with their participation in the plan.

**Brokerage Windows**

With respect to brokerage windows, self-directed brokerage accounts and other similar plan arrangements (together, "brokerage windows" or "arrangements"), which enable participants to select investments beyond a plan's DIAs, the description of such arrangements must provide, at a minimum, sufficient information to enable participants to understand how the arrangements work and whom to contact with questions. Also, in those situations where a plan administrator is unable to provide an explanation of the specific amount of certain fees associated with the purchase or sale of a security through a brokerage window because such fees may not be known in advance of a purchase or sale, the disclosure requirement will be met as long as the explanation states such fees exist and may be charged against a participant's account, and directs participants how to obtain additional information about such fees. Additionally, the required quarterly statements disclosing the amounts of fees and expenses charged against a participant's individual account must also include the amounts charged in connection with any brokerage window, along with a description of the services to which the charges relate.

For those plans that have low participation rates in such brokerage windows, plan administrators still must furnish the required annual fee and expense information relating to such arrangements to all participants, not only to those participants who have elected to use such arrangements.

**Other Guidance**

*403(b) Plans*. While ERISA-covered 403(b) plans are subject to the participant-level disclosure regulations, the DOL clarified that it will not commence enforcement actions against any plan administrator who reasonably determines it would be impractical to obtain the information necessary to meet the disclosure requirements with respect to any annuity contract or custodial account described in section 403(b) of the Internal Revenue Code if: (i) the contract or account was issued before January 1, 2009;
(ii) the employer ceased contributions (including employee salary reduction contributions) to the contract/account before January 1, 2009; (iii) all of the rights and benefits under the contract/account are legally enforceable by the contract's/account's individual owner without the employer's involvement; and (iv) the individual owner is fully vested in the contract/account.

*Website Address*. With respect to providing participants with a website address that allows access to the required information about a plan's DIAs, the DOL clarified that plan administrators have multiple ways to satisfy this requirement, including contracting with the plan's recordkeeper to establish and maintain the website, using the plan sponsor's existing website or using the website provided by the issuer of a DIA, as long as the address is sufficiently specific to lead participants to the required information, including the necessary supplemental investment-related information. Also, the website address must enable participants to obtain each DIA's average annual total return for one-, five- and 10-year periods (or the life of the DIA, if shorter), up to the most recently completed calendar quarter; other performance information, such as year-to-date returns, may also be provided on the website, as long as the information is not inaccurate or misleading.

*Glossary.* With respect to a glossary of terms, or an Internet website address that provides access to such a glossary, which must be furnished to participants on or before the dates they can first direct investments and at least annually thereafter, the DOL indicated it does not intend to publish its own sample glossary. However, the DOL did acknowledge that two sample glossaries it received from industry groups may be used and adapted by plan administrators in fulfilling their disclosure obligations. Those glossaries are: (i) the *Sample Glossary of Collective Investment Fund Terms for Disclosures to Retirement Plan Participants*, developed by the American Bankers Association, which is available at www.aba.com; and (ii) the *Sample Glossary of Investment-Related Terms for Disclosures to Retirement Plan Participants*, (developed by the SPARK Institute and the Investment Company Institute and endorsed by the American Benefits Council, among others), which is available at www.sparkinstitute.org.

*Unregistered DIAs*. With respect to DIAs that are not registered under the Securities Act of 1933 (the "Securities Act") or the Investment Company Act of 1940 (the "Investment Company Act"), the plan administrator must furnish documents that are similar to a prospectus or a summary prospectus, either of which must be furnished for DIAs that are registered under the Securities Act or the Investment Company Act. Whether a document is "similar" to a prospectus or a summary prospectus would depend on the particular facts and circumstances, including the type of designated investment alternative. For example, if the DIA is a bank collective investment fund, a copy of the fund's "written plan" or bank fund fact sheets ordinarily would satisfy the regulation's disclosure requirements because they typically would contain information that corresponds to the information contained in prospectuses or summary prospectuses,

respectively. If documents that would satisfy the regulatory requirements do not already exist, copies of the documents used by a plan fiduciary to select and monitor the DIA typically would be acceptable.

*Transitional Rules*. The DOL stated it is aware that many plan sponsors have already delivered disclosures to participants and that it recognizes it may be difficult and/or costly for plan administrators to make further system adjustments in advance of the August 30, 2012 disclosure deadline (for making the first initial disclosures to participants). And while it did not offer any further broad-based extensions, the DOL did indicate that it will not commence enforcement actions against plan administrators whose disclosures do not comply with the regulations and the FAB if the administrators acted in good faith based on reasonable interpretations of the regulation, and create a plan for complying with the regulations and the FAB in future disclosures.

*Disclosure Deadlines*. The first initial/annual disclosures must be furnished no later than 60 days after July 1, 2012, or, if later, 60 days after the first day of the plan year beginning after November 1, 2011. (Thus, for most plans, including calendar year plans, these initial disclosures must be provided by August 30, 2012.) The initial quarterly statement of fees/expenses actually deducted from participants' individual accounts must be furnished no later than 45 days after the end of the quarter in which the initial disclosure was required
(i.e., November 14, 2012 for calendar year plans).

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[1] On May 17, 2012, the DOL issued a revised FAB containing corrections to Q&A 19.