

EMPLOYEE BENEFITS

DOL EXTENDS DEADLINE FOR PROVIDING ANNUAL COMPARATIVE CHART OF INVESTMENT ALTERNATIVES IN PARTICIPANT-DIRECTED INDIVIDUAL ACCOUNT PLANS

by Jordan Schreier

On July 22, 2013, the DOL announced a temporary enforcement policy that provides the administrators of individual account retirement plans such as 401(k) or 403(b) plans some additional flexibility regarding when they have to provide plan participants and beneficiaries the annual comparative chart of investment alternatives. Last year, plans had to provide for the first time no later than August 30, 2012 (for calendar year plans), the detailed investment-related information to plan participants and beneficiaries about the plan's designated investment alternatives in chart form. Under DOL rules, an updated comparative chart has to be provided at least annually, which means once in any 12-month period. For example, if a plan administrator furnished the first required chart on August 25, 2012, it must furnish the next comparative chart no later than August 25, 2013. A number of plan administrators commented to the DOL that the mid-August original deadline was not tied to any meaningful date or timing but rather was just 60 days from the date by which plan service providers had to send plan fiduciaries their ERISA Section 408(b)(2) disclosure of compensation, fees, services and conflicts. They also commented that the requirement to provide the next annual comparative chart did not coincide with any other notices and would be more likely to attract the attention of participants and beneficiaries if it was provided at the same time as other disclosures, such as with individual benefit statements or during open enrollment for the plan rather than within 12 months of the original notice.

Temporary Enforcement Policy

With this in mind, the DOL announced in Field Assistance Bulletin 2013-02 that it would allow a plan administrator to distribute the "2013 comparative chart" within 18 months of when it distributed the original comparative chart. For this purpose, a "2013 comparative chart" is the comparative chart that is due at least annually after the first comparative chart was furnished in compliance with the regulations. For example, if a plan administrator furnished the first comparative chart on August 25, 2012, the 2013 comparative chart would originally have been due no later than August 25, 2013. In accordance with the Bulletin, the DOL will take no enforcement action based on timeliness if the plan administrator furnishes the 2013 comparative chart by February 25, 2014 (18 months from August 25, 2012). This allows a plan administrator to reset the annual date by which it will have to send future comparative charts to a date that makes more sense for participants and for plan administration.

The DOL also recognized that some plan administrators may have already sent out the required 2013 comparative chart or incurred costs in preparing it. These plan administrators may, but are not required to, furnish the "2014 comparative chart" no later than 18 months after furnishing the prior comparative chart in compliance

with the regulation. For this purpose, a "2014 comparative chart" is the comparative chart that is due at least annually after the second comparative chart was furnished in compliance with the regulations. For example, if a plan administrator furnished the first comparative chart on August 25, 2012, and intends to furnish the second comparative chart on August 25, 2013, the 2014 comparative chart would normally be due under the terms of the final regulation no later than August 25, 2014. Under the Bulletin, the DOL will take no enforcement action based on timeliness if the plan administrator furnishes the 2014 comparative chart by February 25, 2015 (18 months from August 25, 2013). This gives these plan administrators the same opportunity for a one-time "re-set" of the timing for their annual comparative chart.

Importantly, the DOL said that the temporary enforcement policy is only available if the plan administrator determined that taking advantage of it will benefit participants and beneficiaries. This would be true, for example, if the cost of preparing and providing the comparative chart was paid out of plan assets.

This temporary "reset" announcement does not change any other obligations under the regulations intended to ensure that participants and beneficiaries have access to updated investment-related information. For example, changes to a plan's investment instruction procedures or designated investment alternatives must be timely disclosed to participants and beneficiaries as required by the regulation. Further, the investment-related information that is made available at the required Internet Web site address must be updated in accordance with the regulation. Finally, the DOL noted that the Bulletin is an expression of the DOL's enforcement policy but it does not address the rights or obligations of other parties.

Possible Future Flexibility

The DOL also said it was considering providing reasonable flexibility in future comparative chart disclosure deadlines such as a regular 30 or 45-day window during which the chart could be provided rather than maintaining the fixed 12-month annual requirement. Parties wishing to express their views on whether a flexible window would provide plan administrators important flexibility and also preserve participants' and beneficiaries' receipt of regular and timely investment related information can contact the Employee Benefits Security Administration's Office of Regulations and Interpretations.

Next Steps

Plan administrators that have not yet prepared or distributed the 2013 comparative chart for your plan (or had it prepared and distributed by a third party such as the plan's record keeper), should discuss whether delaying the 2013 comparative chart to later in 2013 such as closer to the end of the year, or with open enrollment or other disclosure materials (or even taking advantage of the full 18-month extension) would be prudent. Plan administrators that have already distributed the 2013 comparative chart could consider taking advantage of the 2014 extension.

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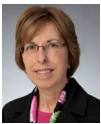
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