Legal Alert: Labor Department Proposes New Disclosures of Fees and Expenses

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After much discussion, the Department of Labor (DOL) has proposed regulations that would require participant-directed plans, including most 401(k) plans, to provide participants with basic disclosures concerning the fees and expenses charged in connection with available investment alternatives, and in connection with administration of the plan. The DOL's concern is that plan participants often do not have access to complete information needed to make informed investment decisions. Specifically, the DOL has found that information on fees and expenses charged by fund managers and others is either not readily available or not easy to understand.

When a plan trustee assigns investment responsibilities to the plan's participants, ERISA requires that participants be provided sufficient information regarding the plan and the investments to make informed decisions about the management of their individual accounts. Under ERISA § 404(c), plan fiduciaries are relieved of liability for the direct results of a participant's investment selection, usually from among an authorized "menu" of investment funds, provided that disclosure and certain other requirements are met. However, ERISA § 404(c) compliance is voluntary, and plans that choose not to comply are not required to provide needed disclosures to participants.

Under the new proposed regulations, all participant-directed plans must provide participants with both plan-related information and investment-related information. The required information must be disclosed in a manner designed to be clearly understood and to enable participants to make determinations involving their individual accounts. The regulation specifically mentions quarterly benefit statements and the plan's summary plan description as two acceptable methods of providing the disclosures. It also includes a model chart that can be used in order to present data in comparative format. Other means of disclosure are permitted, so long as they satisfy the requirements of the regulation.

The plan-related information that would have to be disclosed to a participant before becoming eligible to participate, and at least annually thereafter, (much, but not all, of which is already routinely provided to participants) includes:

• how and when investment instructions may be given;

• to whom investment instructions may be given;

• any limitations or restrictions on the instructions that may be given;

• the specific investment alternatives that are offered under the plan;

• any designated investment managers under the plan;

• an explanation of any fees and expenses for plan administrative services (e.g., recordkeeping) that may be separately charged against the participants' accounts, and the basis on which those charges are allocated to each individual account (e.g., pro rata, etc.);

• information relating to expenses that are assessed on an individual, rather than plan-wide, basis (e.g., fees charged for participant loans, or for personal investment advice); and

• the amount actually charged to the participant's account each quarter, and why the charge was made.

Also prior to the date of eligibility and at least annually thereafter, participants would have to be provided certain information regarding each "designated investment alternative" under the plan. (A "designated investment alternative" would *not* include "self-directed brokerage accounts" or other arrangements that allow participants to select investments other than those specifically designated by the plan.) This information would include: the name of the designated investment alternative ("DIA"); the category (e.g., balanced fund, index fund, etc) of the DIA; whether the DIA is actively or passively managed; and the URL of a website that is sufficiently specific to direct participants to additional information regarding the DIA, including risks, costs and historic performance.

If the DIA is one that does not have a fixed rate of return, such as a typical equity fund, the required disclosure would include the DIA's average annual total percentage returns over one-, five-, and ten-year periods, measured on a calendar-year basis, along with a statement to the effect that an investment's past performance is not necessarily an indication of future performance. The disclosure concerning the DIA's fees and expenses must include: the amount and a description of each fee that is charged directly against a participant's investment, such as current or deferred sales charges, redemption or surrender charges, account fees, etc.; the DIA's expense ratio; and a statement to the effect that fees and expenses are only one of several factors that should be considered when making investment decisions.

If the DIA provides a return that is fixed for the term of the investment, such as a GIC or a CD, the disclosure would have to include both the rate of return and the term of the investment, as well as description of any shareholder-type fees that may be imposed in the event of a purchase of, or a total or partial transfer or withdrawal from, the DIA.

In either case, the participant must also be provided with comparative performance data for an appropriate benchmark index over time periods comparable to the performance data provided for the DIA.

The regulation is proposed to be effective for plan years beginning on or after January 1, 2009. Even for plans that already provide investment-related disclosures, significant changes are likely to be required. Although many of the changes required by the proposed regulation will have to be made by the

providers of investment alternatives (mutual fund companies and others), employers and plan fiduciaries will still be responsible for ensuring that their plans comply with the new requirements. If you have any questions about the proposed rules, or your responsibilities under the regulation, please contact Jeffrey Ashendorf, jashendorf@fordharrison.com, 212-453-5926 or Victoria Chemerys, vchemerys@fordharrison.com, 305-808-2107 or the Ford & Harrison attorney with whom you usually work.