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ERISA Group Benefits Alert

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Participants and Service Providers Fee Disclosure Requirements

The Department of Labor (DOL) has finalized regulations to facilitate fee transparency by requiring various forms of disclosure by service providers and plan administrators. In that regard, retirement plans generally must satisfy the fee disclosure requirements on the following two levels:

- i. Participant Level Fee Disclosure - plan administrators must disclose retirement plan fees and expenses information to plan participants and beneficiaries; and
- ii. Service Provider Level Fee Disclosure - service providers must disclose fee related information to plan fiduciaries.

With respect to the participant level fee disclosure requirements, the first disclosure must be made no later than August 30, 2012. With respect to the service provider level fee disclosure requirements, the deadline for compliance is July 1, 2012. The deadlines are fast approaching. In an effort to assist our clients in complying with the fee disclosure regulations, we have summarized below important information on fee disclosure requirements. We hope you find it helpful.

Participant Fee Disclosure Requirements

The DOL has adopted regulations that require disclosure of various plan fees and expenses to participants.

1. Which Plans Do These Regulations Apply?

The plans that must comply with the participant fee disclosure regulations are all defined contribution plans that are subject to ERISA and that allow participants to direct the investment of any portion of their accounts among designated

investment funds selected by the plan administrator. Governmental and church plans are not subject to these disclosure requirements.

2. What is the Effective Date for the Disclosures?

The first annual disclosure must be given to participants no later than August 30, 2012, and the first quarterly fee disclosure statement must be provided no later than November 14, 2012.

3. What Information Must be Disclosed to the Participants?

Generally, the two types of disclosures required are plan-related disclosures and investment-related disclosures.

- Plan Related Disclosures

Plan related disclosures are broken into the following three categories:

General Plan Information, including information on how to provide investment instruction; explanations of any limitations on such instructions, including any restrictions on transfers to or from a designated investment fund; identification of any designated investment fund offered under the plan; identification of any designated investment managers; and a description of any brokerage windows or self-directed brokerage accounts.

Administrative Expense Information, including information regarding fees for plan administrative services (e.g., legal fees, accounting fees, and recordkeeping fees) that may be charged to an individual participant's account and that are not reflected in the total annual operating expenses of the designated investment fund, as well as the basis on which such charges will be allocated (pro-rata or per capita). These disclosures must be provided on a quarterly statement and must provide the dollar amount of the fees and expenses actually charged during the preceding quarter to the participant's account; a description of the services to which the charge relates, and if applicable, an explanation that some of the plan's administrative expenses for the preceding quarter are paid from total annual operating expenses of one or more of the designated investment funds.

Individual Expense Information, including an explanation of any fees or expenses that may be charged to a participant's account because it relates to that particular participant's account. For example, fees for processing a loan, for processing a QDRO, and for investment advice can be charged only to the participant's account to which it relates. These disclosures are required on a quarterly statement that must include the dollar amount of fees and expenses

actually charged during the preceding quarter to such individual participant's account, and a description of the services to which the charge relates.

- Investment - Related Disclosures

On or before a participant is allowed to direct their investments and annually thereafter, the plan administrator must furnish the following information with respect to each designated investment fund:

Identifying Information, including the name of each investment and the type or category of the investment.

Performance Data, including the average total return of the investment for 1, 5, and 10 calendar year periods, as well as a statement indicating that past performance is not necessarily an indicator of future performance. For investment options with a fixed or stated return, the fixed or stated annual rate of return and the term of the investment, if the rates of return can be adjusted, the minimum guaranteed rate of return, and the phone number or website to obtain the most recent rate of return information must be disclosed.

Bench Mark Information, including the name of the bench mark market index and returns of the bench mark market index over the 1, 5, and 10 calendar year periods compared to the same performance data period provided under the performance data disclosure above.

Fee and Expense Information, including the amount and a description of each shareholder - type fee 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. For variable rate of return investments, the information should include the total annual operating expenses expressed as a percentage; the total annual operating expenses for a one year period expressed as a dollar amount; a statement that fees and expenses are only one factor of several that participants should consider when making investment decisions and that the cumulative effective fees and expenses can substantially reduce the growth of the participant's retirement account. The statement should also notify participants that they can visit the Employee Benefits Security Administration's website for an example demonstrating the long term effect of fees and expenses on their retirement funds.

Website Information, that provides the website where participants can access specific information regarding each designated investment fund.

General Glossary of Terms, to assist the participants in understanding the designated investment funds, or the website where an appropriate glossary can be found.

Investment related information must be provided in a comparative format and the Department of Labor has provided a model chart that can be used for this purpose.

- **Information that Must be Provided Upon Request**

If requested by a participant, the plan administrator must provide copies of prospectuses, copies of financial statements, a statement of the value of a share or unit of each investment fund, and a list of assets in the portfolio of a designated investment fund and the value of each such asset.

4. What are Your Fiduciary Responsibilities?

These regulations do not relieve fiduciaries of their duty to defray reasonable expenses with respect to administering the plan. Fees and expenses should be reviewed on a regular basis (at least annually) to ensure that such fees and expenses are necessary and reasonable for purposes of the plan.

Also, in order to ensure compliance with these new regulations, you should contact your service providers or vendors (who, under a separate set of regulations, are required to provide you with the appropriate information regarding fees and expenses) to gather the appropriate information and to develop the statements.

Service Provider Fee Disclosure Requirements

As you are aware, over the years, the DOL has issued several sets of regulations that require covered service providers to disclose fees to retirement plans. In 2007, the rules were issued in proposed form. In July 2010, the rules were issued in the interim final form. Finally, on February 2, 2012, the DOL released final regulations. The final regulations postponed the effective date of these fee disclosure requirements to July 1, 2012. As the deadline of compliance is fast approaching, service providers should review their disclosure materials to ensure they reflect the modifications made by the final regulations to the long existing interim final regulations. A summary of the significant changes is provided below:

- **Covered Plan** - The final rules clarified that the definition of covered plan excludes annuity contracts and 403(b) custodial accounts issued to current or former employees that were frozen as of January 1, 2009.

- **Initial Disclosure of Indirect Compensation** - The final rules added an additional initial disclosure requirement. A covered service provider must disclose any indirect compensation (i.e., compensation received from any source other than the covered plan or plan sponsor) that the service provider expects to receive. The disclosure must include the identification of the services, the identification of the payer, and a description of the arrangement between the payer and the service provider.
- **Investment Disclosure** - The final rules modified the service provider fee disclosure requirements to coordinate the participant level fee disclosure requirements.
- **Format** - In its final rules, the DOL published a "sample guide" to initial disclosures. Service providers are permitted, but not required, to use the sample to meet their fee disclosure obligations. The DOL intends to issue proposed rules on the format of the disclosure in the near future.
- **Timing of Initial Disclosure; Changes** - All investment related information must be disclosed at least annually. Reporting and disclosure information must be disclosed "reasonably in advance" of the date when the plan administrator must comply with its ERISA reporting obligations. If a service provider made an error or omission in the previously disclosed information, then such error or omission must be corrected within 30 days when the service provider knows of such error or omission.
- **Definition of Compensation** - The final rules clarified the definition of compensation paid to service providers, which may be expressed as a monetary amount, formula, percentage of plan assets or a per capital charge. In addition, if the service provider cannot otherwise readily describe compensation, then compensation may be described as a reasonable and good faith estimate, with explanations of methodology and assumptions used to prepare such estimates.
- **Relief of Plan Fiduciary Liability** - The final rules provide the plan fiduciaries with relief from liabilities arising from service providers' non-compliance with their fee disclosure obligations, provided that some requirements are satisfied. Plan fiduciaries, however, must determine whether to terminate or continue the service contract with service providers. With respect to future services, plan fiduciaries must terminate the contract.

Please note that while service providers may feel that disclosure rules generally describe information that must be disclosed by service providers, the ultimate

responsibility for ensuring that the service provider fee disclosures have been made lies with the plan's fiduciary (generally, the employer). If a covered service provider does not make the required disclosures, then the employer or other responsible fiduciary must report the failure to the DOL.

Conclusion

It is very important for plan administrators to review and update their contracts with their service providers to comply with the new participant fee disclosure requirements. Plan fiduciaries who receive the disclosures should be sure that all the agreements and documents related to the services are consistent with the fee disclosures they receive. In addition, participants may be confused and overwhelmed by all the new information that they will begin receiving regularly. Thus, it is vital that participant communications are carefully crafted to allow for a thorough understanding of plan fees and services.



Please note that this *Benefits Alert* only highlights the most significant changes in the law. The details of these changes are complex and beyond the scope of this Alert. We look forward to discussing these changes and how they may impact your plans with you. Please do not hesitate to contact any of the following members of our Employee Benefits and Executive Compensation Practice if you have any questions or if you would like additional information.



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