

EMPLOYEE BENEFITS ALERT

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DOL Issues Proposed Regulations Regarding Disclosures to Participants of 401(k) Plans

On July 23, 2008, the U.S. Department of Labor (DOL) issued proposed regulations that, if adopted, will require fiduciaries of Section 401(k) plans and other participant-directed defined contribution plans to make new disclosures to participants regarding plan-related fees, investment-related fees and investment performance data. The regulations are proposed to be effective for plan years beginning on or after January 1, 2009. The regulations do not apply to “self-directed brokerage accounts” or similar plan arrangements that permit participants to select investments beyond those that are specifically designated by a plan.

Background

By issuing the proposed regulations, the DOL intends to impose a new legal obligation upon plan fiduciaries to provide regular periodic disclosures to participants of plan-related fees, as well as performance data and expense information about investment alternatives, in order that participants will have sufficient information to make informed decisions about the management of their accounts. The regulations are one of several recent DOL initiatives to make

plan expenses and investment fees more transparent to both plan sponsors and plan participants.

The regulations mandate that fiduciaries of participant-directed defined contribution plans give certain uniform basic disclosures to all participants on a regular and periodic basis, generally when a participant first becomes eligible to participate in the plan and annually thereafter. The DOL believes that such disclosures will help participants become aware of their rights and responsibilities with respect to the investments in their accounts and will assist them in making better investment choices. The proposed regulations require that disclosures be made in two specific categories: plan-related information and investment-related information.

Plan-Related Disclosures

The proposed regulations require fiduciaries to make disclosures of certain general plan information and of administrative and individual expense information.

Fiduciaries are required to provide participants with the following general plan information:

General Information

- Information about how participants may give investment instructions, including any limitations on such instructions, such as restrictions on transfers to or from investment alternatives under the plan
- A description of plan rules relating to the exercise of voting, tender and similar rights with respect to the available investment alternative options under the plan
- A listing of the investment alternatives offered under the plan

The above information must be given to participants on or before the date they first become eligible to participate in the plan and at least annually thereafter. In addition, participants must be furnished with a description of any material changes to the required information no later than 30 days after the date of any such changes.

Expense Information

- At least annually, an explanation of any fees and expenses for plan administrative services (e.g., record-keeping), and the basis on which such charges will be made to participants' accounts (e.g., pro rata or per capita)
- At least quarterly, a statement of the dollar amount actually charged during the preceding quarter to participants' accounts for administrative services, including a general description of the services to which the charges relate
- At least quarterly, a statement of individual expenses that are charged to participants' accounts (Such expenses could include, for example, fees for loans, for investment advice or for processing a qualified domestic relations order.)

Investment-Related Disclosures

The proposed regulations require on an annual basis certain general disclosures concerning the investment alternatives available under the plan, such as the name of

the investment fund and investment category (e.g., money market fund, balanced fund, index fund) and whether the investment alternative is actively or passively managed. In addition, participants must be given an Internet Web site address that is specific enough to lead them to additional information regarding an investment alternative, such as its investment objectives, risks, performance and cost. The DOL believes that ready access to such information over the Internet will obviate the necessity to automatically provide important, detailed investment-related information directly to every participant. The regulations also require plan fiduciaries to provide participants, at least annually, certain information about performance and investment fees.

Performance Data

Specific performance data must be set forth in a prescribed format for each of the plan's investment alternatives. For investment alternatives for which the return is not fixed, a plan fiduciary or its designee must provide the average total return of the investment for the following periods, if available: one year, five years and ten years, measured as of the end of a calendar year. The performance data disclosures must include a statement that an investment's past performance is not necessarily an indication of how it will perform in the future.

The performance data must include a comparison with the performances of broad-based benchmarks over time periods that are comparable to the performance data periods that are required under the regulations. The DOL expects that most plans will simply identify the performance benchmark already being used for the investment option pursuant to the SEC's prospectus requirements, if applicable.

Investment Fees

The regulations require the disclosure of fees and expenses relating to the purchase, holding and sale of each of the plan's investment alternatives. For each investment alternative with respect to which the return is not fixed or guaranteed, a plan fiduciary or its designee must provide the following information:

- The amount, and a description of, each shareholder-type fee charged directly against the participant's account, such as sales-loads, sales charges, deferred sales charges, redemption fees, surrender charges, exchange fees, account fees, purchase fees, and mortality and expense fees
- The total annual operating expenses of the investment alternative, expressed as a percentage (i.e., expense ratio)
- A statement indicating that fees and expenses are only one of several factors that participants should consider when making investment decisions

The proposed regulations include model disclosure forms that can be used to satisfy the requirements of the regulations relating to performance data and investment fees.

Timing Of Disclosures

Each of the various disclosures required by the regulations must be given within certain specific time frames. The disclosures regarding administrative fees and investment-related information must be provided to participants on or before the date of plan eligibility and at least annually thereafter. The disclosures concerning

specific expenses charged to participants' accounts must be provided at least quarterly.

Enforcement

Although no monetary civil penalties can be assessed against plan fiduciaries for failing to provide the required disclosures to participants, any such failure would constitute a breach of fiduciary duty under ERISA. The DOL and plan participants could bring enforcement actions in federal court against plan fiduciaries for failure to provide the required disclosures, and such fiduciaries could be personally liable for any losses incurred by participants as a consequence of not receiving the required disclosures. However, it appears to be problematic as to how the DOL or plan participants could prove in court how a loss had been incurred due to a failure to provide the required disclosures.

Comments On Regulations

The DOL has invited written comments on the proposed regulations on or before September 8, 2008. Given the relatively short time frame between issuance of the proposed regulations and their proposed effective date, it would appear to be unlikely that the regulations, when finalized, will be effective in 2009. ■



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