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PENSION ANALYST

Important information—Plan administration and operation



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DOL issues guidance on participant fee disclosure rules for defined contribution plans

Who's affected

This guidance applies to plan administrators of participant-directed defined contribution plans (including 403(b) plans) that are subject to ERISA. It does not apply to governmental plans, church plans that do not elect to be covered by ERISA ("nonelecting church plans"), or non-ERISA 403(b) plans.

Background and summary

On October 20, 2010, the Department of Labor (DOL) issued [final rules](#) requiring disclosure of fees, expenses, and other plan and investment-related information to participants and beneficiaries in participant-directed defined contribution plans that are subject to ERISA.

On May 7, 2012, the DOL issued [Field Assistance Bulletin 2012-02](#) (Bulletin), to help plan administrators and service providers comply with the requirements of the final rules. This Bulletin supplements the DOL regulations by providing guidance on some frequently asked questions regarding the application of these rules, including guidance on:

- Covered plans;
- Revenue sharing arrangements;
- Brokerage windows;
- Website address requirements;
- Comparative formats;
- Model portfolios; and
- Transition rules.

For calendar year plans, the first annual participant-level fee disclosures must be furnished no later than August 30, 2012 (i.e., 60 days after the effective date of the fee disclosure rules) and the first quarterly statement must be furnished no later than November 14, 2012.

Action and next steps

Employers that sponsor defined contribution plans subject to ERISA that allow participants and beneficiaries to direct the investments in their account should familiarize themselves with the guidance discussed in the Bulletin in preparation for the August 30, 2012 effective date. The DOL has indicated that due to the significance of these required disclosures, the effective date will not be further extended. The DOL also acknowledged that it may be difficult or costly for plan administrators to make system adjustments in advance of the current deadline. As a result, DOL auditors will take into account plan administrator and service provider good faith actions that are based on a reasonable interpretation of the new regulations, as long as they have developed a plan for full compliance with the regulatory requirements for future disclosures.

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The DOL believes fiduciaries of participant-directed defined contribution plans must take steps to ensure participants and beneficiaries are aware of their rights and responsibilities for investing account assets. Plan fiduciaries must provide participants and beneficiaries with sufficient information regarding the plan, and designated investment alternatives under the plan, including related fees and expenses.

The DOL issued final participant fee disclosure rules in 2010. In response to requests for additional guidance, the DOL issued Field Assistance Bulletin 2012-02 to address various questions regarding the final disclosure rules. A summary of this guidance is provided below.

Covered plans

Plans that have both participant-directed and trustee-directed investments must comply with both the plan and investment-related disclosures. However, the plan administrator is not required to provide investment-related disclosures for the trustee-directed investments.

The participant-level fee disclosure rules do apply to ERISA 403(b) plans established or maintained by tax-exempt organizations. However, disclosures do not have to be provided for annuity contracts or custodial accounts issued to current or former employees before January 1, 2009 if:

- The employer is not required to make contributions (and has stopped making contributions) before January 1, 2009;
- The employee can enforce the contract or account without involvement of the employer; and
- The employee is fully vested.

The guidance confirms that the regulations do not apply to non-ERISA 403(b) plans.

Plan-related information

General plan information

If plan-related and investment-related information are disclosed in a single document, the same information does not have to be disclosed twice. Duplicate information identifying the designated investment alternatives (DIA) is not necessary. However, if plan-related information is separately disclosed from investment-related information, the DIAs must be disclosed in each separate document.

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Administrative expenses

Participants and beneficiaries must receive an explanation of any fees and expenses that may be charged against their individual accounts. However, the level of detail for any particular disclosure depends on the specific facts and circumstances of the service and fee or expense. For example, when **fees are known at the time of the disclosure**, the explanation must identify the:

- Service (e.g., recordkeeping);
- Cost of the service (e.g. 12% of the participant's account balance or \$25 per participant); and
- Plan's allocation method (e.g., pro rata).

However, when **services or fees are not known at the time of the disclosure**, the explanation must consider the known facts and circumstances. For example, if a plan administrator reasonably expects to incur legal fees in the plan year but does not know the exact amount of the fees at the time of the disclosure, the explanation should identify the services expected to be performed and the allocation method.

Disclosure is not required for administrative expenses that are not charged against participants' and beneficiaries' accounts and are paid either from:

- Plan forfeitures; or
- The employer's general assets.

In addition, disclosure is not required if the plan has a written commitment from the employer that it will pay expenses that are not covered by forfeitures.

At least quarterly, the plan administrator must furnish to participants and beneficiaries an explanation of the revenue sharing, if any or all plan expenses were paid for by revenue sharing, even if no fees or expenses are allocated to individual accounts. The purpose of the explanation is to describe to participants and beneficiaries that some or all administrative expenses are paid through investment-related charges so they do not think that there are few or no administrative expenses associated with the plan.

Brokerage windows

As required in the final rules, a plan administrator must provide a general description of any brokerage window, account or arrangement offered under the plan. The final rules do not state how specific the description must be but, at a minimum, it must provide:

- Sufficient information to enable participants and beneficiaries to understand how the window, account or arrangement works, such as:
 - How and to whom to give investment instructions;
 - Account balance requirements, if any;
 - Restrictions or limitations on trading, if any;
 - How the window, account or arrangement differs from the plan's designated investment alternatives; and
 - Whom to contact with questions.
- An explanation of any fees and expenses that may be charged against the individual's account, including:
 - Any fee or expense necessary to start, open, or initially access such a window, account or arrangement (such as enrollment, initiation, or start up fees), or to stop, close or terminate access;
 - Any ongoing fee or expense (annual, monthly, or any similar charge or fee) imposed to maintain access to the window, account or arrangement, including inactivity fees and minimum balance fees; and
 - Any commissions or fees (e.g., per trade fee) charged in connection with the purchase or sale of a security, including front or back end sales loads if known. If the fees are not known, a general statement that such fees exist and that they may be charged against the individual account and how to obtain information about such fees will satisfy the requirement.

- A statement of the dollar amount of fees and expenses that were actually charged during the preceding quarter against the participant's or beneficiary's account, including a description of the services to which the charges relate.

The DOL expects a plan administrator to provide the annual fee and expense information to **all** participants and beneficiaries, not just to those who have elected to use the window, account or arrangement. All participants and beneficiaries must receive this information in order to make informed decisions about whether to direct the investment of their accounts into these arrangements.

The Bulletin includes some surprising and unexpected guidance regarding a situation where a plan offers an investment platform (e.g., brokerage window) consisting of a large number of registered mutual funds that are not DIAs. A platform consisting of multiple investment alternatives would not itself be a DIA. However, the DOL notes that the failure to designate a manageable number of investment alternatives raises concerns regarding fiduciary responsibilities.

Until further guidance is issued, when a platform holds more than 25 investment alternatives, the DOL will not require that all of the investment alternatives be treated as DIAs if the plan administrator:

- Makes the required disclosures for at least three of the investment alternatives on the platform that collectively meet the [broad range requirements](#) in the ERISA 404(c) rules; and
- Makes the required disclosures with respect to all other investment alternatives on the platform in which at least five participants and beneficiaries, or, in the case of a plan with more than 500 participants and beneficiaries, at least one percent of all participants and beneficiaries, are invested on a date that is not more than 90 days preceding each annual disclosure.

Prudential Retirement is working with industry groups and other service providers to seek clarification from the DOL on this guidance.

Investment-related information

Closed investments

Plans may have a designated investment alternative that is closed to new money, but allows participants and beneficiaries to keep prior funds in the investment and to transfer out of this investment to other plan investment alternatives. The guidance clarifies that a plan administrator must furnish disclosures for this closed investment alternative. However, a plan administrator may provide this information only to those individuals who remain invested in that closed investment.

Website address requirements

A plan administrator must provide an internet website address for each investment that provides additional specific investment information. The Bulletin offers multiple ways to satisfy this obligation. A plan administrator may:

- Contract with a third party administrator or recordkeeper to establish and maintain the website for the plan;
- Use the existing website address of the employer that sponsors the plan to make available the required supplemental information; or
- Use website addresses provided by the issuers of the DIAs as long as the address is sufficiently specific to guide the participants to the required information.

The plan administrator must ensure the availability of a website address, but is not responsible for the completeness and accuracy of the information used to satisfy the disclosure requirements, when the plan administrator reasonably and in good faith relies on information received from or provided by a plan service provider or issuer of a DIA.

The website address must be “sufficiently specific” to lead the participant to investment-related information. Whether an address is sufficiently specific will depend upon the facts and circumstances. A plan sponsor should consider the following factors:

- User-friendliness of the website;
- Number and complexity of the plan’s DIAs; and
- Computer literacy of the average plan participant.

Glossary

The investment-related disclosure must also include a glossary of terms to assist participants and beneficiaries in understanding their investments. The DOL does not intend to publish a sample glossary. However, the Bulletin does include glossaries prepared by the [SPARK Institute](#) and [American Bankers Association](#).

Comparative format

Plan administrators may provide multiple comparative charts furnished by the plan’s service providers or investment issuers. However, all of the charts must be furnished to participants and beneficiaries at the same time in a single mailing or transmission and the charts must be designed so that a participant can compare the various investments available under the plan.

If there is a change to a DIA’s fee and expense information after the plan administrator has furnished the comparative charts to participants and beneficiaries, a new comparative chart does not have to be automatically furnished to participants. However, the website must be updated as soon as reasonably possible following the change.

While the comparative chart must reflect performance data on the basis of the most recently completed calendar year, the chart may provide data ending in the most recently completed calendar month or quarter. However all investments would need to have the same ending date and all benchmarks would have to use the same time period.

Form of disclosure

Disclosures do not have to be furnished as stand-alone documents. Plan administrators may furnish the required disclosures with, or as part of, other documents, provided the timing requirements are satisfied. For example, disclosures may be furnished as part of the plan’s summary plan description or pension benefit statement.

Definitions

Model portfolios

The Bulletin addresses whether “model portfolios” (portfolios that describe investment strategies made up of the plan’s DIAs) are DIAs that require disclosure. Examples of model portfolios would be conservative, moderate and growth. The guidance provides that a model portfolio is not required to be treated as a DIA as long as the disclosure explains that a model portfolio is a means of allocating account assets among specific DIAs. However, if a plan participant acquires an equity security, unit participation or similar interest in an entity that itself invests in some combination of the plan’s designated investment alternatives, that portfolio would be a DIA.

The disclosure should also explain how the model portfolio operates and how it differs from the plan’s investment alternatives.

Effective dates

For most plans, including calendar year plans, the initial disclosures must be furnished to participants and beneficiaries no later than August 30, 2012. The first quarterly disclosures must be provided no later than November 14, 2012, for most

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calendar year plans. The first quarterly statement must reflect only the fees and expenses deducted for the calendar or plan-year quarter covered by the statement. For example, for calendar plans, the first quarterly disclosure must reflect the fees and expenses actually deducted from the third quarter.

Next steps

Prudential Retirement has dedicated tremendous resources and focus on developing disclosure solutions that are accurate, efficient and effective. The recently issued guidelines will require some modifications to our documents, and planning for those changes is underway. In some cases, further guidance is required from the DOL for our planning to begin. Specifically, the new requirement regarding brokerage accounts and other similar investment platforms requires considerable analysis and validation of interpretation. We remain active in industry discussions and activity seeking clarification from the DOL on the expected course of action specific to these rules. Once that guidance is issued, our planning for required adjustments can begin.

Pension Analyst by Prudential Retirement

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Editor: Mitzi Romano

(860) 534-2768

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