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401(k) Plan Fee Disclosure: Regulation and Litigation

**Presented by: The Committee on Employee Benefits and
Executive Compensation**

Chair - Beth J. Dickstein

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DOL Issues Proposed Regulation Requiring Plan and Investment-Related Fee Disclosures for All Participant-Directed Individual Account Plans

The U.S. Department of Labor recently issued a proposed [regulation](#) that would require retirement plans to disclose information about fees and expenses to all participants and beneficiaries who direct the investment of their individual plan accounts. Although the proposed disclosures are similar to those already required under section 404(c) of ERISA, the regulation would apply to all participant-directed individual account plans, regardless of whether the plan intends to comply with section 404(c). The proposed regulation would be effective for plan years beginning on or after January 1, 2009.

Except with respect to quarterly disclosures about fees and expenses actually charged to a participant's or beneficiary's individual account (as described more fully below), the newly required information would have to be provided upon an individual's initial eligibility to participate in the plan and at least annually thereafter. The information could be incorporated in the summary plan description, provided the timing requirements are met.

Plan-Related Information: The regulation would require fiduciaries to disclose to participants and beneficiaries general information about the plan, as well as specific information about administrative expenses and individual expense information.

- **General Plan Information.** If the proposed regulation is adopted, fiduciaries would be required to disclose the names of any designated investment managers and information about any "designated investment alternatives" (defined below) available under the plan, such as how to provide investment direction and how to exercise associated voting, tender and similar rights, along with any applicable restrictions or limitations. Any material changes to general plan information would also have to be disclosed within 30 days of the date the change is adopted.
- **Plan Administrative Expense Information.** Plan fiduciaries also would have to provide participants with information about fees and expenses for plan administrative services (such as legal, accounting, and recordkeeping fees) that may be charged against individual accounts, as well as information about how

those fees and expenses are allocated among accounts. In addition, a summary description of fees and expenses actually charged to an individual's account, along with the dollar amount charged, would have to be disclosed quarterly, *e.g.*, by inclusion in the quarterly benefit statement already required by section 105(a)(1)(A) of ERISA.

- **Individual Account Expense Information.** Plan fiduciaries would also have to furnish participants with an explanation of fees and expenses that may be charged against their individual accounts, such as fees related to plan loans, qualified domestic relations orders or investment advice. A description of fees and expenses actually charged to a participant's or beneficiary's account for individual services, along with the dollar amount charged, would have to be disclosed quarterly, *e.g.*, by inclusion in the quarterly benefit statement already required by section 105(a)(1)(A) of ERISA.

Investment-Related Information: The regulation would also require fiduciaries to disclose certain investment-related information to participants and beneficiaries. This includes the identification of any "designated investment alternatives" available under the plan, as well as performance data, benchmarks and investment fees and expenses. "Designated investment alternative" is defined as any investment option designated by the plan (such as a mutual fund or a company stock fund) into which participants or beneficiaries may direct the investment of their accounts, excluding brokerage windows or self-directed brokerage accounts.

The rules would require that investment-related information be provided in a chart or similar format that allows comparisons among the designated investment alternatives, along with the name and contact information of a plan fiduciary who can provide additional investment-related information and a statement that more current information may be available at a designated Web site. The proposed regulation includes a safe harbor [model chart](#) that may be used to satisfy the disclosure

requirement, but fiduciaries would have the option to create their own chart.

- **Identifying information.** Under the proposed rules, fiduciaries would be required to provide the name of each designated investment alternative, a Web site address where additional information for each alternative can be found, and information about the category of the investment (*e.g.*, money market fund, balanced fund, large-cap fund) and the type of management utilized (*e.g.*, actively managed, passively managed).
- **Performance data.** Information about each investment's average annual total return for the 1-year, 5-year and 10-year periods (to the extent available), along with performance data for the corresponding benchmarks, or, for fixed-rate investments, the rate of return and term of investment would also have to be furnished.
- **Fee and expense information.** Information about the amount and description of fees charged directly against the investment (such as sales loads, sales charges, and redemption fees), the expense ratio, and the amount and description of fees applicable to the purchase, transfer or withdrawal of any fixed return investments would also have to be provided. A statement that fees and expenses are only two of several factors that should be considered when making investment decisions would also have to be included. Note, however, that there is nothing in the proposed regulation which would require fiduciaries to disclose the portion of any investment-related fees which may be used to offset plan administrative expenses.
- **Other Information.** Like the requirement currently applicable to plans that are intended to comply with section 404(c) of ERISA, the regulation would require that participants and beneficiaries be advised that more detailed investment information (such as copies of prospectuses, financial statements, list of assets or other

reports) are available upon request. Participants and beneficiaries would also have to be furnished with information about the pass-through of voting, tender and other similar rights after their investment, if applicable.

The proposed rule provides that the required disclosures may be furnished in any manner consistent with the general disclosure requirements under section 104 of ERISA, including the use of electronic media. It clarifies that it would not be necessary to provide newly eligible individuals with updated investment-related disclosures; instead, it would be sufficient to provide them with the most recent investment-related information provided to participants and beneficiaries, in addition to notice of any subsequent material changes.

Written comments on the proposed regulations are due to be submitted to the Department of Labor by September 8, 2008. Comments may be sent by e-mail to e-ORI@dol.gov (put the phrase "Participant Fee Disclosure Project" in the subject line) or via the federal rulemaking portal at <http://www.regulations.gov>. Comments may also be sent to:

Office of Regulations and Interpretations
Employee Benefits Security Administration
Attn: Participant Fee Disclosure Project, Room N-5655
U.S. Department of Labor
200 Constitution Ave. N.W.
Washington, D.C. 20210.

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What 401(k) Plan Fiduciaries Must Tell Participants about Their Investment Options: New DOL Guidance

Erin M. Sweeney

Participant Disclosure – Overview

- Proposed regulations issued on July 23, 2008.
- Proposed regulation to be added at § 2550.404a-5.

Participant Disclosure

- Investment of plan assets is a fiduciary act.
- Fiduciary must discharge duties prudently.
- Fiduciary must discharge duties solely in the interest of participants and beneficiaries.

Participant Disclosure

- If a plan allocates investment responsibilities to participants or beneficiaries
- Fiduciaries must take steps to ensure that participants and beneficiaries
 - Are provided sufficient information regarding the plan
 - On a regular and periodic basis
 - Including information re: fees and expenses
 - In order make informed decisions re: management of their individual accounts

Timing and Form of Participant Disclosures

- Duty to Disclose
 - Plan years beginning on or after January 1, 2009
 - On or before the date of plan eligibility
 - At least annually thereafter
 - 30 days after any material change
 - Satisfied by providing most recent annual disclosure plus material changes on or before date of plan eligibility

Timing and Form of Participant Disclosures

- Duty to Disclose (continued)
 - May be provided as part of a summary plan description
 - May be provided as part of a pension benefit statement
 - Comparative format (model provided)
 - Fiduciary contact information
 - Statement re: obtaining current investment information from the internet

Timing and Form of Participant Disclosures

- Duty to Disclose (continued)
 - May be expressed in the form of a monetary amount, formula, percentage of assets or per capita charge
 - Must be calculated to be understood by the average plan participant

Types of Participant Disclosures

- General Disclosures
 - 1) Explanation of circumstances under which participants and beneficiaries may give investment instructions
 - 2) Explanation of limitations under the plan, including restrictions on transfer to or from an investment alternative

Types of Participant Disclosures

- General Disclosures (continued)
 - 3) Voting and tender rights
 - Exercise
 - Restrictions
 - May include a description or refer to plan document
 - Materials provided to the plan must be provided to participant or beneficiary if voting rights are passed through to the participant or beneficiary

Types of Participant Disclosures

- General Disclosures (continued)
 - 4) Designated investment alternatives
 - 5) Designated investment managers

Types of Participant Disclosures

- Administrative Expenses
 - 1) Description of fees and expenses for plan administrative services not included in investment-related fees and expenses (legal, accounting, recordkeeping).
 - 2) Description of allocation basis (pro rata, per capita).

Types of Participant Disclosures

- Administrative Expenses (continued)
 - 3) Dollar amount charged to participant or beneficiary's account for previous quarter. Quarterly.
 - 4) Description of services provided for amounts charged to participant or beneficiary's accounts for previous quarter. Quarterly.

Types of Participant Disclosures

- Individual Expenses
 - 1) Explanation of fees and expenses that may be charged against the individual account of a participant or beneficiary for services provided on an individual basis (plan loan processing, QDROs, individual investment advice). Upon plan eligibility and at least annually thereafter.
 - 2) Dollar amount charged to individual participant or beneficiary's account for previous quarter. Quarterly.

Types of Participant Disclosures

- Individual Expenses (continued)
 - 3) Description of services provided for amounts charged to participant or beneficiary's accounts for previous quarter. Quarterly.

Types of Participant Disclosures

- Investment Related Information
 - 1) Name of the investment alternative.
 - 2) Internet address containing the following information:
 - Name of investment's issuer or provider
 - Investment's principal strategies and attendant risks
 - Assets comprising the investment's portfolio
 - Portfolio turnover
 - Investment performance and related fees and expenses

Types of Participant Disclosures

- Investment Related Information (continued)
 - 3) Type or category of investment
 - 4) Type of management utilized by the investment
 - 5) Average annual total return (1 year, 5 year, 10 year) for investments that are not fixed or the fixed rate and term of the investment
 - 6) Benchmarking data for investments that are not fixed
 - 7) Amount and description of fees charged against a participant or beneficiary's investment
 - 8) Total annual operating expenses expressed as an expense ratio

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Types of Participant Disclosures

- Investment Related Information (continued)
 - 9) Fees applicable to a purchase, transfer or withdrawal for fixed return investment
 - 10) Statement regarding consideration of fees and expenses in making investment decisions

Participant Disclosure Upon Request

- Prospectuses or similar materials
- Financial statements or reports provided to the plan relating to the plan's investments
- Value of a share or unit of each investment alternative and the date of the valuation
- List of assets comprising the portfolio which constitute plan assets and the value or proportion of the investment comprised of plan assets