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Other DOL Plan Fee Initiatives

New Schedule C. In November 2007, the DOL proposed major modifications to the Form 5500 Schedule C. While Schedule C has always required plans to disclose fees paid to service providers, the new modifications **greatly** expand the kinds of fee payments reported to the government.

Service Provider Disclosures. In December 2007, the DOL proposed rules requiring service providers to provide specific information to plan fiduciaries about the direct and indirect fees they receive. This proposal aims to improve plan fiduciaries' understanding of the fees paid to service providers and would allow the fiduciary to complete the new Schedule C.

Current Status. Like the proposed participant disclosure regulations, the DOL has indicated that these proposals will also be effective January 1, 2009. However, their ultimate effective date may be later.



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New Proposed Rules for Fee and Investment Disclosures to Participants

On July 23, 2008, the Department of Labor (DOL) released its latest disclosure guidance, proposed regulations requiring most 401(k) plan fiduciaries to provide participants with more information about fees and investment options.

The proposed regulations specifically require fiduciaries of participant-directed plans to **automatically** provide certain fee and investment disclosures to participants. The following information will need to be provided to participants when they first become eligible to participate in the plan and at least **annually** thereafter.

General Plan Information

- Investment options available under the plan;
- The process for participants to give investment instructions, and whether there are limits on the instructions (*e.g.*, frequent trading restrictions);
- Voting and tender rights associated with plan investment alternatives; and
- The identity of any plan investment managers.

Participants must also be notified within 30 days of material changes to this information.

Plan-Wide Administrative Expenses

- A description of administrative fees and expenses charged to the plan as a whole, including recordkeeping, legal and accounting fees;
- The basis on which charges are allocated (*e.g.*, on a pro-rata or per-capita basis); and
- The dollar amount of plan-wide fees and expenses actually charged to the participant's account, and a generalized explanation of the service provided. This information must be provided **each quarter**.

Individual Expenses

- A description of any fees and expenses that will be charged directly to an individual's account, such as QDRO fees, participant loan fees, or investment advice fees; and
- The individual fees actually charged to the participant's account. This information must be provided **each quarter**.

Investment-Related Information

- The name, investment category, and management type (*e.g.*, active management or passive management) of each investment option offered under the plan, along with an internet address where a participant can obtain specific information about the investment's strategy, risk, assets, portfolio turnover, fees and performance;
- The average annual total return for each plan investment option over one-year, five-year, and ten-year periods;
- Performance data comparing the plan's investment options against an appropriate, independent benchmark over these periods; and
- Fees associated with each investment option, including the total annual operating expenses of the investment option, along with any shareholder-type fees that apply, such as sales loads, sales charges, deferred sales charges, redemption fees, and surrender charges.

Fiduciaries must present this investment information in a chart form. The chart must include contact information for the plan's investment fiduciaries and web addresses where participants can obtain more information. The proposed regulations also require plan fiduciaries to provide participants, upon request, with prospectuses or similar documents for each investment option, along with other financial information the plan receives about investment alternatives, and a description of which portfolio assets in the investment alternative constitutes a plan asset under ERISA.

ERISA Section 404(c) Changes. The disclosures required under the proposed regulations largely replace the disclosures previously required under ERISA Section 404(c). ***Importantly, this replacement effectively removes the prior ERISA Section 404(c) requirement that participants automatically receive a prospectus after their first investment in certain investment funds.*** This is good news, since many plans were unable to satisfy this ERISA Section 404(c) requirement.

Effective Date. The DOL has indicated that it intends to finalize these regulations so that they can be effective January 1, 2009. However, many commentators believe that this timetable is too aggressive and the final regulations will ultimately have a later effective date.

Conclusion and Practical Considerations. The proposed regulations, when finalized, will present major new requirements for plan fiduciaries, although some of the disclosure required by the proposed regulations is similar to disclosure required under ERISA Section 404(c). However, compliance with ERISA Section 404(c) is elective, and the requirements of the proposed regulations will be mandatory.

Plan fiduciaries will need to work with their recordkeepers and investment providers to generate the necessary information. The proposed regulations give guidance on how the disclosures can be integrated into a plan's summary plan description, quarterly account statements, annual statements, and prospectus-like investment documents.

If you have questions about the proposed regulation or the DOL's other initiatives on plan fees and expenses, feel free to contact David Putnal (404.888.8836) or Toby Walls (404.888.8870).

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