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How to Disclose Fees in Retirement Plans

Service

Employee Benefits & Executive Compensation

Professional

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On May 7, 2012, the U.S. Department of Labor (DOL) published Field Assistance Bulletin No. 2012-02, which contains 38 frequently asked questions on the new participant disclosure regulations. The participant disclosure regulations and the companion regulations on disclosures by service providers to plan fiduciaries are intended to improve the transparency of fees and investment expenses associated with retirement plans. Although presented as an explanation of the regulations, FAB 2012-02 appears to impose additional requirements. Compliance with those requirements by the deadline may be challenging. The bulletin also reveals useful insights into the standards that the DOL will use to enforce the regulations and can serve as the basis for participants' claims. Initial disclosures to participants are due no later than August 30, 2012, and plan administrators are legally responsible for complying with all participant disclosure requirements. The following summary highlights several key points raised in the bulletin, including new guidance and interpretations that participants and administrators should note.

Although primarily intended to address the participant disclosure rules, FAB 2012-02 also contains guidance on the fee disclosure that covered service providers must give to plan fiduciaries beginning July 1, 2012. In its announcement that accompanied the release of FAB 2012-02, the DOL said it expected to issue another set of FAQs that would focus on disclosure by covered service providers very soon.

Question No. 30 of the bulletin contains new requirements concerning brokerage windows. For example, the answer states that if "significant numbers of participants and beneficiaries" select particular investments, the plan fiduciary has an affirmative duty to determine whether any of such investments should be considered "designated investment alternatives" that would be subject to the extensive disclosure requirements applicable to

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designated investment alternatives. However, it is not clear what the DOL considers “significant numbers of participants and beneficiaries” for this purpose. Because this is the first time that the DOL discussed this new duty, it is not clear how plans are supposed to – or whether it is realistic for plans to be able to – implement steps to comply before the disclosure deadlines.

Question No. 30 also states that a platform consisting of multiple investment alternatives itself is not a designated investment alternative. The answer warns that the failure to designate a manageable number of investment alternatives may constitute a failure to meet a fiduciary’s duties; this may impose another a new fiduciary standard.

Other noteworthy items addressed by FAB 2012-02 include the following:

Investment-related disclosures are not required for any part of a plan that is trustee-directed rather than participant-directed.

Investment related disclosures are generally required for nongovernmental 403(b) plans that are covered by the Employee Retirement Income Security Act of 1974 (ERISA).

Expenses that are paid entirely from forfeitures or by the employer do not need to be disclosed.

The specific plan administration expenses paid and the specific designated investment alternatives that provide revenue sharing for making the payment do not need to be identified in the quarterly disclosure of plan administration expenses.

Expenses must be included in each quarterly disclosure even if the expenses are paid from revenue sharing and are not deducted from participants’ accounts.

Investment-related information must be disclosed for investment alternatives that are closed to new participants.

The bulletin specifies the requirements of a plan website.

The bulletin refers to – but does not specifically endorse – two sample glossaries from industry groups that plan administrators may consider to satisfy the requirement that plans include a glossary to help participants and beneficiaries understand designated investment alternatives.

The guidance clarifies that the requirement to furnish a comparative chart disclosure for designated investment alternatives may be met by providing multiple comparative charts, so long as the charts are furnished to participants and beneficiaries in a single mailing or transmission.

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The guidance explains that disclosures need not be furnished as stand-alone documents but may be included with other documents, such as summary plan descriptions.

The guidance clarifies that a fiduciary investment manager who is appointed by participants and beneficiaries to allocate investments among the plan's designated investment alternatives is not a designated investment alternative.

A model portfolio that is clearly presented as a means of allocating assets among designated investment alternatives need not be treated as a separate designated investment alternative.

The disclosure of operating expenses for a fund of funds must include the operating expenses of the acquired funds.

The net operating expenses calculation for designated investment alternatives that are not registered under the Investment Company Act of 1940 (generally designated investment alternatives that are not mutual funds) must be calculated at least monthly.

The deadlines for implementing the disclosure requirements will not be extended beyond July 1, 2012, (service provider disclosures to plan fiduciaries) and August 30, 2012, (plan fiduciary disclosures to participants); the DOL enforcement policy will require plan administrators to act in good faith based on a reasonable interpretation of the regulations.

What This Means to You

FAB 2012-02 provides extensive detail on the implementation of the participant fee disclosure regulation and is a reminder of the complexity of these rules. Plan administrators should consider enlisting outside experts to confirm that the disclosures to participants comply with applicable rules. Plan administrators have a motivation to get it right because, in addition to any DOL enforcement action, future participant litigation over failed or unsuccessful investments may include a claim for failure to comply with the fiduciary requirements for disclosure of plan fees and expenses.

Contact Info

Please contact a member of the Employee Benefits & Executive Compensation practice group if you have questions or if we can assist in any way.

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