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DOL Issues Proposed Regulation on Participant Disclosure for Participant-Directed Individual Accounts

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On July 23, 2008, the Department of Labor (DOL) issued Proposed Regulation §2550.404a-5 (www.dol.gov/ebsa), which upon adoption, would require the disclosure of certain plan and investment-related information (including fee and expense information) to participants and beneficiaries in participant-directed individual account plans. The proposed regulation is issued with conforming amendments to the existing regulations under ERISA §404(c) in order to establish a uniform, basic set of disclosures for participants and beneficiaries without regard to whether a plan is a §404(c) plan.

The proposed regulation will require the investment-related content of the required disclosures to be in a form that encourages and facilitates *comparative* review among investment options under a plan.

The disclosure requirements of this proposed regulation are required to be met by plan fiduciaries for plan years *beginning on or after* January 1, 2009; however as the final regulations may look different from these proposed regulations, no immediate action is required.

▲ Scope of the Proposed Regulation

The DOL interprets ERISA §404(a)(1) to impose upon fiduciaries of participant-directed individual account plans the duty to furnish participants information necessary to manage their individual account in an informed manner. Consequently, the proposed regulation, in general, delineates for plan fiduciaries the steps that must be taken in a participant-directed individual account plan to assure that participants receive sufficient information regarding *plan related information* and regarding the *investment alternatives* available under the plan.

The proposed regulation is quite clear in establishing that the requirements of compliance with the proposed regulation are *in addition to* other ERISA requirements for discharging fiduciary obligations. Specifically, nothing in the regulation would relieve a fiduciary of his or her responsibilities to prudently select and monitor providers to a plan and the investments made available under a plan.

The proposed regulation mandates that plan fiduciaries provide participants with specified *plan AND investment* information. The following information must be provided when a participant becomes eligible to participate in the plan and thereafter on an annual basis. Plan fiduciaries must disclose:

- A description of fees and expenses charged to participants and beneficiaries for plan administrative services such as legal, accounting and recordkeeping charges as well as how those charges will be allocated to individual accounts;
- A description of fees and expenses charged to a specific participant's account based upon actions taken by that participant, such as charges for processing plan loans, investment advice or qualified domestic relations orders;
- General plan information, including what investment options are available under the plan and how to provide investment direction;
- Information concerning the plan's investment options, for example fee and expense information, past performance data, comparability to benchmarks and a web site address for additional information.

In addition, the following information must be disclosed on a quarterly basis:

- The actual dollar amount charged to a participant's account during the preceding quarter for specified administrative expenses.

While encouraging the disclosure of investment related information in a comparative format in order to allow participants to compare investment options, the DOL has provided a "Model Comparative Chart" as an appendix to the proposed regulation.

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▲ Plan-Related Disclosures

The plan-related set of disclosures (**Prop. Reg. §2550.404a-5(c)**) under the proposed regulation is divided into three sub-categories:

General plan information

The proposal includes disclosure of – (i) how participants may give investment instructions; (ii) limitations on investment instructions; (iii) limitation on transfer between investment alternatives; (iv) exercise of investment rights (e.g. voting, tender) and limitations on such rights; (v) the investment options offered under the plan; (vi) investment managers who may receive investment direction.

General plan-related information must be provided on or before the date a participant becomes eligible to participate in a plan and thereafter on an annual basis. Material changes to any of these general items must be disclosed not more than 30 days after adoption. The proposal allows for these disclosures to be made in the plan's Summary Plan Description (SPD) (it is unclear how this will mesh with the annual requirement noted above).

Administrative Plan expenses

The proposal explains that administrative expenses are those charges for plan administrative services that are not included in investment-related fees and expenses and are charged to the individual account balances of participants. The basis/allocation of the charge (e.g. pro-rata or per capita) must also be disclosed. General administrative expenses include charges for (i) legal; (ii) accounting, and (iii) recordkeeping expenses allocated to participants.

The administrative expense disclosure is intended by DOL to inform participants concerning the day-to-day operational expenses of the plan that will be charged to individual accounts. The statements should be specific enough to enable participants to distinguish these general administrative expenses from other individual transactional charges.

Administrative expenses are required to be disclosed on or before the date a participant becomes eligible to participate in a plan and thereafter at least on an annual basis. On a quarterly basis, plans must provide participants with an aggregate dollar amount charged to a participant's account for these legal, accounting and recordkeeping services. The proposed regulation allows initial and annual disclosures to be made in the SPD *or* in the quarterly benefit statement and the aggregate quarterly information may be included in the plan's quarterly benefit statements.

Individual Plan Expenses

This part of the proposal focusses upon the disclosure of information related to the expenses incurred for an individual transaction rather than on a plan-wide basis. It is intended that such expenses would include the disclosure of charges for plan participant loans, investment advice services or a qualified domestic relations order.

An explanation of individual plan expenses is required to be disclosed on or before the date a participant becomes eligible to participate in a plan and thereafter at least on an annual basis. On a quarterly basis, plans must provide participants with an identification of the transaction and the dollar amounts of each expense actually charged to a participant. The proposed regulation allows initial and annual disclosures to be made in the SPD *or* in the quarterly benefit statement and the quarterly information may be included in the plan's quarterly benefit statements.

▲ Investment-Related Disclosures

The investment-related set of disclosures (**Prop. Reg. §2550.404a-5(d)**) under the proposed regulation is also divided into three sub-categories and relates to a plan's designated investment alternatives. Under the proposed regulation, a designated investment alternative means any investment option offered under a plan into which participants may direct their investments. It is important to note that 'designated investment alternative' does not include brokerage windows or self-directed brokerage accounts. Investment-related information includes (i) information to be automatically furnished, (ii) post-investment information, and (iii) information to be furnished upon request.

Information to be Provided Automatically

The proposal requires a plan to disclose to participants; identifying information, past performance data, comparable benchmark data and fee and expense information. Specifically, this sub-category of disclosure requires plan fiduciaries to make the following disclosures with respect to *each* designated investment alternative under a plan:

- Name of investment option
- Asset category (money market, long-term corporate bond, equity index et. al.)
- Passive or active management
- Internet web site address to obtain supplemental information regarding the investment option (investment strategy, risks, performance and costs)
- Performance data expressed as average annual total return for 1, 5, 10 & 15 years (if available)
- Broad-based benchmark data over the same time periods as performance data

- o account fees, purchase fees, mortality and expense fees
- o Total annual operating expense expressed as a percentage (i.e. expense ratio)
- o Statement indicating the fees and expenses are only one of several factors for consideration by participants

The proposed regulation states that in providing the above information the disclosure must be provided on or before the date a participant is eligible to be covered under a plan and that fiduciaries may provide newly eligible participants the most recent annual disclosure furnished to participants. This same information must be furnished annually after initial participation.

The format for presenting the automatic investment information under the proposal is a chart. The DOL states that investment information provided in chart format will provide a straightforward comparison of the plan's investment alternatives to plan participants. The fiduciary's name and contact information is required to be on the chart along with statement informing participants that more current information about any investment alternative may be available on the web site for the investment alternative.

As stated previously, the DOL provides a Model Comparative Chart in the proposed regulation. The proposed regulation provides that a fiduciary that uses and accurately completes the model format will be deemed to have satisfied the requirements for disclosing information in a comparative format. The DOL also notes that the model chart is not the exclusive means for satisfying the requirement for facilitating a comparison of investment alternatives.

Post Investment Information

This category requires that where a plan investment provides for shareholder rights (e.g. pass-through voting, tender offer rights) the fiduciary must furnish participants who have invested in such investment alternative with materials about these shareholder rights that have been provided to the plan. This requirement is similar and comparative to the requirement under §404(c) plans relating to pass-through materials.

Information to be Provided Upon Request

The proposal will require plan fiduciaries to provide the following information upon participant request – (i) prospectus, (ii) financial reports, and (iii) statement of valuation and of assets held by an investment alternative.

▲ Summary

Written comments on the proposed regulation must be received by September 8, 2008 which is an unusually short comment period. It is encouraging that the DOL has asked for comment as to the potential burdensome nature of many issues including, but not limited to, web sites, chart formatting, timing etc.

ASPPA's Government Affairs Committee will analyze the details of this proposed regulation and provide a thorough written response.