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NEW PROPOSED DISCLOSURE REQUIREMENTS FOR RETIREMENT PLAN FEES AND INVESTMENT EXPENSES Part I of II

If ever there was an issue to cause retirement planning to become a "hot topic," it is the controversy over plan expenses paid from participant accounts. The U.S. Department of Labor ("DOL") has responded after years of debate with new proposed regulations that would require detailed disclosure of plan administrative and investment expenses in participant directed individual account plans like 401(k) plans and Individual Retirement Accounts (IRAs). The first part of this Alert covers the plan administrative disclosures. The second part will cover the investment expense disclosures. Part II will be published in the next issue.

Plan administrative disclosure of the following information would be required upon eligibility and at least annually to each participant:

- Plan investment procedures, availability of investments, and any investment restrictions;
- Plan-level expenses by category – legal, accounting, recordkeeping, etc.– and how these expenses are allocated to each participant, namely whether pro rata or per capita, with additional quarterly disclosures of the actual dollar amount charged to each participant's account; and
- Specific individual-level expenses chargeable for particular individual administrative functions, such as loan processing or review of domestic relations orders (not like the plan-level expenses above), with additional quarterly disclosures of the actual dollar amount charged, if any, to each respective participant.

Rationale for the New Disclosures

These proposed regulations highlight Congress' increased desire to ensure participants in participant directed individual account plans – 401(k) plans and IRAs – have sufficient information to make sophisticated investment decisions in a rational and balanced manner. This concern came to the forefront of public policy discussions because plan participants brought suit under prudence and loyal violations for paying excessive plan fees. These lawsuits persist today. Currently, Congress and the DOL believe that participants in 401(k) plans do not have access to adequate investment and fee and expense information to make informed investment decisions. If made effective, these proposed regulations would require the heightened disclosures for plan years starting on or after January 1, 2009.

The Proposed Plan Information Disclosure Requirements

Three types of general plan information disclosures will be required for participant-directed individual account plans.

Disclosure of General Plan Information

On or before an individual becomes eligible to participate in the plan, and at least annually after the initial disclosure, plans will be required to disclose general plan information, including:

- Information on how participants communicate investment directions;
- Any restrictions on investment directions, such as blackout periods or other restrictions on transfer;

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- Where a participant can find information regarding voting, tender, or other similar investment-ownership rights;
- Investments available under the plan; and
- Identification of any designated investment managers.

Any material changes to this information must be communicated to plan participants and beneficiaries within 30 days of the adoption of the change.

Disclosure of Plan Administrative Expenses

Plans will be required to provide participants and beneficiaries with:

- A general explanation of any fee and expense for plan administrative services, including legal, accounting, and recordkeeping services, that may be charged to the plan as a whole, and how these fees will be allocated to the individual participant accounts (whether pro rata or per capita), or whether the employer-sponsor will pay the fees. These disclosures must be made to each participant or beneficiary on or before plan eligibility, and at least annually after the initial disclosure; and
- A quarterly statement detailing the services provided and the actual dollar amount of administrative expenses charged to the applicable account in the previous quarter.

Disclosure of Individual Expenses

Plans will be required to provide participants and beneficiaries with:

- A general explanation of any possible fee and expense that may be charged against their individual accounts for services provided to them, rather than on a plan basis (e.g. fees related to processing loans or qualified domestic relations orders, fees for investment advice, and similar services that are charged on an individual basis). These disclosures must be made to each participant or beneficiary on or before plan eligibility, and at least annually after the initial disclosure; and
- A quarterly statement detailing the services provided and the actual dollar amount of the individual fees, if any, charged to their account in the previous quarter.

Consequences of Violation

A fiduciary of a 401(k) plan must comply with the regulations, once final, in order to satisfy the duties of prudence and loyalty under ERISA § 404(a)(1)(A) and (B). Failure to comply with these regulations may be a breach of fiduciary duty. Additionally, ERISA § 404(c) protection will be lost.

Although these regulations are only proposed at this time, they indicate the DOL's intent to require heightened plan and investment disclosures in fulfillment of the fiduciary duties of prudence and loyalty. Any final regulations are likely to be similar to the proposed regulations.

What Should Plan Sponsors Do?

- Contact your administrative service providers and investment service providers to ensure processes are implemented that comply with the regulations once finalized (expected to be effective January 1, 2009).
- Contact your employee benefits counsel to implement a plan of compliance with the final regulations, once issued.

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