

Authored by Kevin L. Burch and Kelly C. Young

September 17, 2008

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

This Alert is the second in a two-part series. The first part covers new plan information disclosures and the second part covers investment information disclosures. Part I can be found [here](#).

The U.S. Department of Labor ("DOL") proposed ERISA 404(a) and (c) regulations would require disclosure in two main categories: plan information and investment information. The first part of this Alert discussed the onerous plan information disclosures. Here, we discuss the investment information disclosures.

The DOL's new proposed regulations would require detailed disclosure of investment expenses in participant directed individual account plans like 401(k) plans and IRAs. Investment expense disclosures would be required upon eligibility, and at least annually, to each participant of the following information:

- Each available investment under the plan, its annual expense ratio and other applicable expenses; and
- Each available investment's one-year, five-year, and ten-year performance data and associated benchmark index.

The DOL issued a model disclosure chart in the proposed regulations that would satisfy the form of the disclosure requirements.

The Proposed Investment Information Disclosure Requirements

Investment related disclosures include information that must be provided automatically, information that must be provided subsequent to investment, and information that must be provided upon request. The DOL requires the use of a comparative format, such as the "Model Comparison Chart," provided as an appendix to the proposed regulations, to allow the participants and beneficiaries to easily compare performance, fees, and expenses associated with each investment option. Any fee or expense information can be expressed as a dollar amount, formula, percentage of assets, or per capita charge.

The Proposed Plan Information Disclosure Requirements

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

Information that Must Be Provided Automatically

The investment related information that must be automatically disclosed to participants and beneficiaries, on or before their date of eligibility, and at least annually after the initial disclosure, includes:

- The name of each investment available under the plan.
- A web address where participants and beneficiaries can find more information related to each available investment.
- The type of each investment (e.g. money market, stock, bond, large cap fund, etc.).

HRO CONTACTS

Christine M. Daly
Partner
christine.daly@hro.com
303-866-0486

Carolyn E. Daniels
Partner
carolyn.daniels@hro.com
303-866-0391

Irene F. Gallagher
Partner
irene.gallagher@hro.com
303-866-0503

Jonathan A. Marks
Partner
jonathan.marks@hro.com
303-866-0377

David T. Mitzner
Partner
david.mitzner@hro.com
303-866-0217

Edwin G. Schuck, Jr.
Partner
ed.schuck@hro.com
213-572-4337

Sheldon H. Smith
Partner
sheldon.smith@hro.com
303-866-0490

Carolyn Cox
Special Counsel
carolyn.cox@hro.com
801-323-3225

Kevin L. Burch
Associate
kevin.burch@hro.com
303-866-0544

Kelly C. Young
Associate
kelly.young@hro.com
303-866-0323



Holme Roberts & Owen LLP
Attorneys at Law

Experience Listens. Be Heard.™

- How each investment is managed (actively or passively).
- If an investment does not have a fixed rate of return, for example a stock fund, large cap fund, real estate investment trust, etc., participants and beneficiaries must be given:
 - performance data for the investment over the previous one-year, five-year, and ten-year time periods, if available;
 - performance data for a comparable benchmark to the investment for the same one-year, five-year, and ten-year time periods;
 - a statement reminding the participants and beneficiaries that past performance is not necessarily an indication of how an investment will perform in the future;
 - the amount of, and a description of, each fee charged directly against the participant's or beneficiary's investment in that investment option (e.g. sales charges, redemption fees, account fees, etc.); and
 - the total annual operating expenses of the investment (expressed as a percentage).
- A statement that fees and expenses are only one factor to consider when selecting investments.

Information that Must Be Provided Subsequent to Investment

- Any materials provided to the plan related to the exercise of voting, tender, or similar rights that result from the investment.
- These materials must be provided to the participants and beneficiaries to the extent that such rights are passed through to the participants and beneficiaries.

Information that Must Be Provided Upon Request

- Copies of prospectuses.
- Financial statements or reports.
- Statements of the value of a share or unit of each investment option and its valuation date.
- A list of the assets in the portfolio of each investment option.

Consequences of Violation

A fiduciary of a participant-directed individual account plan must comply with the regulations, once finalized, 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. If a plan qualifies for ERISA § 404(c) protection, this protection will be lost upon a violation of these regulations.

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).
- Review your available investments to ensure you have access to the fee and expense information required to be disclosed.
- Contact your employee benefits counsel to implement a plan of compliance upon finalization of the regulations.

This article is a periodic publication of Holme Roberts & Owen LLP and should not be construed as legal advice or legal opinion on any specific facts or circumstances, nor is it intended to address specific disclosure or compliance issues that may arise in particular circumstances or provide an exhaustive discussion of the topics discussed herein. The contents are intended for general informational purposes only, and you are urged to consult counsel concerning your own situation and any specific legal questions you may have. For further information regarding the topics described herein, please contact any of the individuals listed on the right side of page one.