

Regulatory Update

A Practical Guide to the 401(k) Participant Disclosure Requirements

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As most readers are by now well aware, the Department of Labor (DOL) issued new final regulations in October 2010 that require plan administrators to provide specified information to 401(k) plan participants.¹ The requirements go into effect in 2012. The new regulations include a number of detailed requirements that will take plan administrators some time to consider and implement and it is certainly not too early to prepare for the 2012 effective date.

The Regulatory Update column in the January 2011 issue analyzed the regulations in detail. This column, in contrast, is intended to serve as a practical guide, or a checklist, for plan administrators as they prepare for compliance with the regulations. The first part will be a brief, high-level overview of the regulations. Then, for each of the two major categories of disclosure under the regulations, plan-related information and investment-related information, there is a chart setting forth (1) what information is required to be disclosed, (2) by when and how often the information must be provided, and (3) in what form or document may the information may be provided.

It is hoped that the charts can serve as a quick reference for plan administrators, but the charts are not intended to be a detailed or exhaustive analysis. Those readers in need of a more detailed discussion are encouraged to consult the January 2011 column or the regulations themselves which are available at the DOL's Employee Benefits Security Administration Web site.²

Brief Overview

The regulations require the plan administrator to provide two different general types of information to participants in a "covered individual account plan" (the definition of which is discussed below)—plan-related and investment-related information. Some of the disclosures are required at or before the time a participant may make an investment election and then are required annually thereafter; others are required quarterly. The regulations generally apply with respect to "designated investment alternatives" under the plan, which is defined to exclude self-directed brokerage windows. The disclosures of fee and expense information and performance information follow some of the requirements for mutual fund disclosures and are required to be in a "comparative format." The DOL provided a model disclosure along with the regulations.

There are special rules for investment options that are (a) investments with fixed returns, (b) annuities, and (c) company stock. Plan administrators of plans with those types of investment options should carefully review the requirements. The DOL has proposed additional special rules for target date or similar funds (i.e., investment options with an asset allocation that becomes more conservative over time), but those are still in proposed form at the time this column went to press.

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The regulations apply to “covered individual account plans,” which include all participant-directed “individual account plans,” as defined in ERISA, but does *not* include IRAs, SEPs, or SIMPLEs. The disclosures must be made to any participant or beneficiary with the right to direct investments under the plan. For ease of reference, this column will refer to the parties entitled to the disclosures as “participants.”

The regulations assign the duty to provide the disclosure to the “plan administrator.” Perhaps recognizing, however, that plan administrators are likely to look to investment providers for much of the required information, the regulations also provide that a plan administrator will not be liable for the completeness and accuracy of information received from plan service providers if the plan administrator relies reasonably and in good faith on that information. Thus, it is expected that compliance with the regulations will be a joint effort between plan administrators and service providers.

The regulations were adopted under Section 404(a), ERISA’s fiduciary rules such that failure to satisfy the disclosure requirements constitutes a breach of fiduciary duty. This is in contrast to most of ERISA’s disclosure requirements which impose fines or penalties for failure to provide required disclosures. While the disclosure rules were issued under the fiduciary rules, the DOL provides that nothing in the regulations is intended to relieve a fiduciary from the duty to prudently select and monitor investment options.

	What?	When and How Often?	In What Form or What Document?
A.	Explanation of the circumstances under which participants may give investment instructions.	<ul style="list-style-type: none"> On or before the date on which a participant can first direct investments (may use the most recent annual disclosure, updated for any changes). At least annually thereafter. Generally at least 30 days but not more than 90 days in advance of the effective date of a change. 	May be provided in an SPD or pension benefit statement <i>if</i> timing requirements are satisfied by those documents.
B.	Explanation of any limitations on investment instructions.	Same.	Same.
C.	A description of plan provisions relating to the exercise of voting, tender and similar rights.	Same.	Same.
D.	An identification of any designated investment alternatives offered under the plan.	Same.	Same.

	What?	When and How Often?	In What Form or What Document?
E.	An identification of any designated investment managers.	Same.	Same.
F.	A description of any self-directed brokerage window.	Same.	Same.
G.	An explanation of any fees and expenses for general plan administrative services NOT reflected in the total annual operating expenses of any designated investment alternative.	Same.	Same.
H.	The dollar amount of fees and expenses described in row G.	At least quarterly.	A statement (may be included as part of a pension benefit statement).
I.	A description of the administrative services covered by the fees and expenses in rows G and H.	Same.	Same.
J.	If applicable, an explanation that some of the plan's administrative expenses were paid from the annual operating expenses of one or more of the designated investment alternatives (e.g. through revenue sharing).	Same.	Same.
K.	An explanation of fees and expenses that may be charged against the individual account of a participant rather than on a plan-wide basis and which are NOT reflected in the total annual operating expenses of any designated investment alternative (e.g., loan fees, QDRO fees, etc.).	<ul style="list-style-type: none"> • On or before the date on which a participant can first direct investments (may use most recent annual disclosure, updated for any changes). • At least annually thereafter. • Generally at least 30 days but not more than 90 days in advance of the effective date of a change. 	May be provided in an SPD or pension benefit statement <i>if</i> timing requirements are satisfied by those documents (see next column).
L.	The dollar amount of fees and expenses described in row K.	At least quarterly.	A statement (may be included as part of a pension benefit statement).

	What?	When and How Often?	In What Form or What Document?
M.	A description of the administrative services covered by the fees and expenses in rows K and L.	Same.	Same.

Investment-Related Information

	What?	When and How Often?	In What Form or What Document?	Special Rules for Annuities, Fixed Return or Company Stock?
A.	The name of each designated investment alternative.	<ul style="list-style-type: none"> On or before the date on which a participant or beneficiary can first direct investments (can use most recent annual disclosure). At least annually thereafter. 	<ul style="list-style-type: none"> Separate disclosure (not SPD or pension benefit statement). Can satisfy requirements by using model disclosure. 	<ul style="list-style-type: none"> For annuities, must disclose: <ul style="list-style-type: none"> Name of contract, fund or product Option's objectives or goals Benefits and factor that determine price Limitations on the ability to participants to withdraw or transfer.
B.	Average annual total return of the investment for 1-, 5- and 10-calendar year periods.	Same.	Same.	<ul style="list-style-type: none"> Special definition of "average annual total return" for company stock. Fixed return investments must disclose fixed or stated annual return. Not applicable to annuities.
C.	Statement indicating that an investment's past performance is not necessarily an indication of how the investment will perform in the future.	Same.	Same.	<ul style="list-style-type: none"> Not applicable to annuities, but statement regarding insurance company guarantees are required.

	What?	When and How Often?	In What Form or What Document?	Special Rules for Annuities, Fixed Return or Company Stock?
D.	The name and return of the appropriate benchmark over 1-, 5-, 10-calendar year periods.	Same.	Same.	<ul style="list-style-type: none"> • Not applicable to annuities.
E.	Amount and description of each shareholder-type fee (e.g. commissions, sales loads, sales charges, redemption fees, exchange fees, etc.) that are NOT included in the total annual operating expenses of any designated investment alternative.	Same.	Same.	<ul style="list-style-type: none"> • Not applicable to annuities, but required to disclose any fees that will reduce the value of amounts allocated to the annuity option. • Fixed return investment must also disclose restriction or limitation on purchase, transfer or withdrawal of the investment.
F.	Total annual operating expenses of the investment expressed as a percentage (<i>i.e.</i> expense ratio).	Same.	Same.	<ul style="list-style-type: none"> • Only applies to company stock if in a company stock fund. • Not applicable to annuities.
G.	Total annual operating expenses of the investment for a 1-year period expressed as a dollar amount for a \$1,000 investment.	Same.	Same.	<ul style="list-style-type: none"> • Only applies to company stock if in a company stock fund. • Not applicable to annuities.
H.	A statement that fees and expenses are only one of several factors to consider in making investment decisions.	Same.	Same.	<ul style="list-style-type: none"> • Not applicable to annuities.

	What?	When and How Often?	In What Form or What Document?	Special Rules for Annuities, Fixed Return or Company Stock?
I.	A statement that the cumulative effect of fees and expenses can substantially reduce the growth of the account and that participants can visit the website of the Employee Benefit Security Administration for an example demonstrating the long-term effect of fees and expenses.	Same.	Same.	<ul style="list-style-type: none"> Not applicable to annuities.
J.	Internet web site address providing access to the following information regarding the designated investment alternative: Name of issuer Objectives or goals Principal strategies and principal risks Portfolio turnover rate Performance data from row B updated on at least a quarterly basis. Fee and expense information from rows E through J.	Same.	Investment web site address to be included in stand-alone disclosure; Internet web site provided via internet.	<ul style="list-style-type: none"> Different information required at Internet web site for annuities, company stock and fixed return investments.
K.	Glossary of terms.	Same.	Either in the stand-alone disclosure or at an Internet web site address provided in the stand-alone disclosure.	
L.	Name, address and telephone number of plan administrator.	Same.	In the stand-alone disclosure in the comparative chart.	

	What?	When and How Often?	In What Form or What Document?	Special Rules for Annuities, Fixed Return or Company Stock?
M.	A statement that additional investment-related information is available at the listed Internet web site.	Same.	Same.	
N.	A statement explaining how to request and obtain free paper copies of the information listed in row J made available at the Internet web site address.	Same.	Same.	
O.	Materials relating to the exercise of voting, tender and similar rights to the extent passed through to the participant under the terms of the plan.	Subsequent to the investment.	Provide the materials provided to the plan.	
P.	Copies of prospectuses or similar documents.	Upon participant request.	Provide requested document.	
Q.	Copies of financial statements or reports, to the extent the materials are provided to the plan.	Same.	Same.	
R.	A statement of the value of a share or unit of each designated investment alternative and the date of the valuation.	Same.	Provide statement requested.	
S.	A list of the assets comprising the portfolio of each designated investment alternative if the assets of the designated investment alternative are plan assets (in other words, not mutual funds).	Same.	Provide list requested.	

Conclusion

As noted above, the regulations go into effect in 2012. The charts were intended to set forth the requirements in a “list” format so that plan administrators can assess how they intend to satisfy disclosures and the extent to which they will be looking to plan service providers to supply some of the required information. The list may also be a useful tool for plan administrators in working with service providers to confirm all required information is provided.

Of course, the regulations themselves contain considerably more detail on each of the requirements, including detailed definitions and other detailed conditions. Thus, readers are urged to consult with the regulations themselves or with legal counsel in preparing to comply with the rules.

Endnotes

- 1 29 C.F.R. § 2550.404a-5 et seq.
- 2 <http://www.dol.gov/ebsa/>