New ERISA Rules Impose Participant Fee Disclosure Requirements

On October 14, 2010, the Department of Labor (the "DOL") released a final regulation setting forth certain fiduciary obligations with respect to fee disclosure for participant-directed individual account plans, such as 401(k) plans. The new rules are the latest piece of a multi-part rulemaking project intended to bring transparency to investment- and service-related fees and costs borne by retirement plans and their participants. The rules will generally apply for plan years beginning on or after November 1, 2011.

Section 404 of the Employee Retirement Income Security Act of 1974 ("ERISA") requires fiduciaries of plans subject to ERISA to act prudently and solely in the interest of the plan's participants and beneficiaries. The new rules are premised on the view that fiduciaries of participant-directed individual account plans cannot meet this standard without taking steps to ensure that participants have sufficient information to make informed decisions about managing their accounts.

Plans that have been operated as so-called "Section 404(c) plans" may have already disclosed much of the information required by the new rules. However, the existing disclosure requirements of Section 404(c) are elective so that, if the rules are satisfied, a fiduciary may avoid liability for investment decisions ultimately made by participants. On the other hand, the new general Section 404 rules are mandatory, apply to all participant-directed plans and will impose affirmative disclosure-related fiduciary duties on plan administrators.

Who is affected and what must be disclosed?

The new rules apply to plan administrators of "covered individual account plans." The final regulation narrows the reach of the proposed regulation, which applied more broadly to all fiduciaries. A "covered individual account plan" is any participant-directed individual account plan, other than simplified employee pensions and simple retirement accounts.

Plan administrators will now be required to provide participants with current disclosures of specified plan-related features and fees, including an explanation of the participant-directed investment feature and descriptions of investment alternatives, direct and indirect administrative fees, and participant-level fees (e.g., "brokerage window" fees). The disclosures must be provided not later than the date a participant can first direct his or her investments, annually thereafter, and generally upon any change to the disclosed information.

Plan administrators will also be required to provide participants with current disclosures of certain investment-related information, including descriptions of each investment alternative and of fees and expenses charged on those investments. The exact information to be disclosed depends on the type of investment alternative. This information must likewise be disclosed not later than the date the participant can first direct his or her investments, and annually thereafter.

We also note that, for the first time, the DOL has expressly stated in a regulation that Section 404(c) does not "relieve a fiduciary from its duty to prudently select and monitor" investment alternatives. Previously, the DOL has stated this position in regulatory preambles and in its amicus briefs.

Is there a duty to update?

Plan administrators will be required to provide participants with quarterly or more frequent updates on a variety of information, including the amount of administrative fees and expenses actually charged to the participant's account and a description of the services for which those fees and expenses were charged. On an ongoing basis, plan administrators will also have to forward to participants any materials provided to the plan relating to the exercise of voting, tender and similar rights. In addition, at a participant's request, the plan administrator will have to provide updated prospectuses (or summary prospectuses), financial statements, statements of the value of shares or units of investment alternatives, and, for any investment alternative holding "plan assets," a list of assets held in the investment's portfolio.

How is information to be presented?

The plan administrator can provide the plan-related disclosures in the plan's summary plan description or in pension benefit statements. Information required to be provided at least quarterly may be provided in quarterly benefit statements.

The investment-related information must be furnished in a chart or similar format designed to facilitate comparison among designated investment alternatives. The DOL has provided a model chart that can be used to satisfy investment-related reporting requirements.

Helpfully, the regulations clarify that the plan administrator will not be liable for the completeness and accuracy of the information disclosed if it relies reasonably and in good faith on information from a plan service provider or from the issuer of a designated investment alternative.

When do the new rules apply?

The new rules will generally apply to covered individual account plans for plan years beginning on or after November 1, 2011. Although compliance is not required before then, administrators and investment providers for participant-directed plans (whether or not Section 404(c) plans) will want to prepare well in advance, as a number of interpretative and practical issues may need to be addressed for proper compliance.

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Ropes & Gray's earlier alert on the interim final regulation on fee disclosure under Section 408(b)(2) of ERISA is available here.

Please feel free to contact any member of Ropes & Gray's Benefits Practice Group with any questions about the new requirements.

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