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Disclosure of Plan Fees and Administrative Expenses to Participants

In a recent Benefits Alert ([click to view alert](#)), we discussed the U.S. Department of Labor's recently issued rules on the disclosure of plan service provider fees to a plan's responsible fiduciary to avoid prohibited transaction penalties. In 2010, the Department of Labor issued final rules explaining the disclosures plan fiduciaries are required to make to participants in an individual account type retirement plan, such as a 401(k) plan, about the plan's fees and expenses. The effective date for these participant disclosure rules, however, was postponed to coordinate with the effective date for the disclosure rules for plan service provider fees.

Now that these service provider fee disclosure rules have been issued in final form, the fee and expense disclosures required under these participant disclosure rules must initially be provided to plan participants and beneficiaries no later than **August 30, 2012**, and the first quarterly statements required under these rules must be provided no later than **November 14, 2012**.

What Must Be Disclosed?

In general, there are two categories of information that must be disclosed to participants and beneficiaries of an individual account plan – (i) plan-related information and (ii) investment-related information.

Plan-Related Information

There are three categories of plan-related information that must be disclosed to participants and beneficiaries who have the right under the plan to direct the investment of assets held in, or contributed to, his or her individual account. In providing the information, a plan administrator may reasonably, and in good faith, rely on information received from or produced by a plan service provider or the issuer of a plan investment option. The disclosures must be made on or before a participant or beneficiary can direct his or her investments in the plan, and at least once per year thereafter. The three categories of plan-related information that must be disclosed are:

1. General information, which includes:

- an explanation of the circumstances under which investment instructions are to be given;
- an explanation of any specific limitations on such instructions, including restrictions on transfers to or from an investment option;

- descriptions of or references to plan provisions relating to the exercise of, or restrictions on, voting, tender or similar rights in connection with an investment in an investment option;
- identification of all investment options offered under the plan and the identity of any investment managers to whom investment instructions may be given; and
- if applicable, a description of any “brokerage window,” “self-directed brokerage accounts,” or similar arrangements allowing individuals to select investment options other than those designated by the plan administrator.

2. Administrative expense information, which includes:

- an explanation of the fees and expenses for general plan administrative services (such as legal, accounting and recordkeeping) which may be charged to their accounts and which are not reflected in the total annual operating expenses of the plan investment options; and
- the basis on which those expenses may be made, for example, pro rata, per capita, and in terms of a monetary amount, a formula, a percentage of assets. This information may be disclosed in the plan’s summary plan description.

If there is a change in this information, it must be generally be disclosed at least 30 days, but not more than 90 days, in advance of the effective date of the change.

In addition, the plan administrator must furnish the following information at least quarterly, for example, as part of a plan’s quarterly benefit statement:

- the dollar amount of fees and expenses actually charged to the individual’s account during the previous quarter;
- a description of the services to which the charges relate; and
- if applicable, an explanation that in addition to the fees and expenses paid by means of direct charges, some of the plan’s administrative expenses were paid from the total operating expenses of one or more of the plan’s investment options.

3. Individual expense information, which includes the fees and expenses that may be charged against their individual accounts, rather than on a plan-wide basis, and which are not reflected in the total annual operating expenses of any plan investment option. Examples of such individualized fees and charges include charges for plan loans, Qualified Domestic Relations Order (QDRO) processing fees, brokerage window fees, commissions, front or back-end sales charges, and redemption fees.

For individual expense disclosures that are required to be made prior to the date the individual can first direct the investment of his or her accounts, the plan administrator may satisfy this obligation by furnishing the most recent annual disclosures (and any updates) that were furnished to all participants and beneficiaries with respect to all plan investment options.

If there is a change in this information, it must generally be disclosed at least 30 days, but not more than 90 days, in advance of the change.

In addition, the plan administrator must furnish the following information at least quarterly:

- the dollar amount of the fees and expenses actually charged during the preceding quarter; and
- a description of the services to which the charges relate.

Investment-Related Information

1. Information which must be provided automatically for each plan investment option --

On or before the date participants and beneficiaries can first direct investments in their accounts, and once per year thereafter, the following must be disclosed:

- The name of each plan investment option and the investment category (for example, money market fund, balanced fund or large cap stock fund);
- For a plan investment option without a fixed rate of return, the average annual return of the investment option for 1, 5 and 10 calendar year periods (or for the life of the investment option, if shorter), and the name and returns of appropriate benchmarks for the comparable performance data periods;
- Also, for a plan investment option without a fixed rate of return: (i) amount and description of each shareholder type fee (such as commission or sales loads), (ii) total operating expenses expressed as a percentage, (iii) total annual operating expenses for a 1 year period expressed as a dollar amount for a \$1,000 investment, (iv) a statement indicating fees and expenses are only one of several factors to be considered when making investment decisions, and (v) a statement that the cumulative effect of fees and expenses can substantially reduce the growth of the account;
- For a plan investment option with a fixed rate of return: (i) the fixed rate of return, and (ii) the term of the investment. If the rate can be adjusted during the term, the details of that possibility must also be disclosed;
- Also, for a plan investment option with a fixed rate of return: (i) the amount and description of any shareholder-type fees, and (ii) and a description of any purchase, transfer or redemption restriction or limitation and the circumstances under which it would apply;
- A website address where participants and beneficiaries can go to find specific information about each plan investment option;
- A general glossary of terms to help participants and beneficiaries understand the plan investment options; and
- Special disclosure rules apply to plan investment options that are (i) annuities issued by insurance companies, or (ii) employer securities.

Special rules for target date or similar funds were reserved in these regulations, and will be addressed in future guidance.

For individual expense disclosures that are required to be made prior to the date the individual can first direct the investment of his or her accounts, the plan administrator may satisfy this obligation by furnishing the most recent annual disclosures (and any updates) that were furnished to all participants and beneficiaries with respect to all plan investment options.

2. **Disclosures in comparative formats** -- The disclosure of investment-related information must be made in a chart or similar format that is designed to better enable participants and beneficiaries to compare information for each plan investment option. A model comparative chart can be found at: www.dol.gov/ebsa/modelcomparativechart.doc.

3. **Information to be provided following an individual's investment in a plan investment option** -- Any materials received by the plan administrator relating to voting, tender and similar aspects of any plan investment must be provided to all individuals who have invested in that option.

4. **Information to be provided upon request** -- The following information relating to plan investment options must be provided upon request:

- copies of prospectuses, including summary or short-form prospectuses;
- copies of financial statements or reports;
- statements of the value of a share or unit of each plan investment option and the date of that valuation; and
- a list of assets comprising the portfolio of each plan investment option which would constitute plan assets and the value of each such asset (or what portion of the investment it comprises).

No Relief From Fiduciary Duties

The participant fee disclosure rules make it clear that nothing in the rules is intended to relieve a plan fiduciary from its duty to prudently select and monitor plan service providers or the range of investment options offered under the plan.

Action Steps

If your company sponsors a participant-directed individual account plan, such as a 401(k) plan, then you should contact each plan record keeper or other service provider responsible for issuing or servicing the plan's investment options and discuss how:

- the service provider may be able to provide all of the disclosures that are necessary to meet the participant fee disclosure rules; and
- how you and/or the service provider will coordinate with respect to producing this information and making it available to participants and beneficiaries.

As a practical matter, your plan's record keeper or other service provider should have already contacted you – or should soon contact you – regarding how it will assist you in meeting the participant fee disclosure rules. If you don't hear from them shortly, contact them directly.

Given the fee and performance information that must now be disclosed, it is also a good time to reassess your plan's investment options and determine if they need to be modified as to selection and/or fee structure.

You should also review your plan's summary plan description to make sure that the newly required information is provided in the document, or decide to provide this information by means other than through the summary plan description.

If you have questions about these new participant disclosure requirements, or any other issues relating to your employee benefit plans, please contact any of the Honigman attorneys listed on this Benefits Alert.