



## DOL Proposes Participant Disclosure Regulations for Defined Contribution Plans

*The Department of Labor recently released proposed regulations intended to increase transparency of fees and expenses to participants in self-directed individual account plans (e.g., Section 401(k) plans). The proposed regulations are part of an ongoing DOL initiative to provide plans and plan participants with sufficient information to make informed investment decisions. As proposed, the regulations would be effective for plan years beginning on or after January 1, 2009.*

### Background

ERISA Section 404(a) requires that fiduciaries act prudently and solely in the interest of a plan's participants and beneficiaries when investing plan assets. Where a plan assigns investment responsibility to its participants (as is the case for participant-directed individual account plans), the DOL believes that plan fiduciaries have a duty to provide participants with enough information (including plan fees and expenses) to manage their accounts. Although disclosure is already required by plans that elect to comply with Section 404(c), the DOL believes that similar requirements should extend to all fiduciaries of participant-directed individual account plans and has issued [proposed regulations](#) to accomplish this.

The proposed regulations continue the DOL's focus on increasing the transparency of plan-related fees and expenses. In November 2007, the DOL issued final regulations on Form 5500 annual reporting and disclosure requirements for employee benefit plans (see our December 19, 2007 [For Your Information](#)) and in December 2007, the DOL proposed regulations requiring service providers to disclose fees, compensation and conflicts of interest (see our January 3, 2008 [For Your Information](#)).

### The Proposed Regulations on Participant Disclosures

Under the proposed regulations, two categories of information must be disclosed to defined contribution plan participants and beneficiaries – plan-related information and investment-related information. All of the required disclosures must be written in a manner that can be understood by the average plan participant. Investment-related information must be provided in a chart or similar format designed to allow an easy comparison of investment alternatives. The DOL has provided a model chart that may be used to satisfy the regulations' new comparative format requirements.

**BUCK COMMENT.** *Because the proposed regulations would require information to be provided to both plan participants and beneficiaries, plans may face increased administrative burdens and compliance costs.*

## Plan-Related Disclosures

**General Disclosures.** General plan information that must be disclosed includes –

- how participants and beneficiaries may give investment instructions
- limitations on investment instructions, including restrictions on making or changing investments
- a description of the exercise of voting, tender and similar rights (including any restrictions on those rights) arising from an investment in a designated investment alternative
- a list of the plan's investment options
- identification of designated investment managers.

**Administrative Expenses.** The proposed regulations require that participants and beneficiaries receive plan fee and expense information at regular and periodic intervals. The notices must provide an explanation of any fees and expenses for plan administrative services (e.g., legal, accounting, recordkeeping) that may be charged to the plan. The explanation must also include how these charges will be allocated to, or affect the balance of, each individual account (e.g., pro rata, per capita).

On a quarterly basis, each plan participant or beneficiary must also receive a statement of the actual dollar amount charged to his or her account for administrative services during the preceding quarter, along with a general description of the services provided. In the preamble, the DOL clarifies that a service-by-service breakout is not required and administrative expenses may be disclosed in the aggregate.

**Individual Expenses.** Participants and beneficiaries must also be provided an explanation of fees and expenses that may be charged against their accounts for services provided on an individual – rather than on a plan-wide – basis (e.g., fees related to plan loans, QDROs, and investment advice services). In addition, the plan fiduciary must notify each plan participant and beneficiary quarterly of the amounts actually charged during the preceding quarter, along with a description of the services provided.

## Investment-Related Disclosures

For each investment option in the plan (other than a brokerage window, self-directed brokerage account or other similar individual-investment arrangement), fiduciaries must automatically disclose to each participant and beneficiary certain information including –

- information identifying investment alternatives, including the name and category of the investment, type of management (e.g., active or passive), and the website where supplemental information may be obtained
- performance data for each investment alternative without a fixed return, including the average annual total return on investment for the preceding one-year, five-year, and ten-year periods and broad-based benchmarks for the same time periods (e.g., unaffiliated market index)
- for investment alternatives with a fixed return, both the fixed rate of return and the term of the investment
- shareholder fees related to the purchase, sale and holding of the investment alternative (e.g., sales loads, sales charges, deferred sales charges, redemption fees, surrender charges, mortality and expense fees)
- total annual operating expenses of the investment expressed as a percentage (i.e., expense ratio)
- a statement that fees and expenses are only one factor, among many, to consider when investing
- the name and contact information of the fiduciary who can provide additional requested material
- a statement that more current investment-related information may be available at the listed website.

**Materials Provided Upon Request.** Prospectuses, financial statements or reports relating to the investment alternatives, share values, and a list and the value of plan assets within each investment alternative would have to be provided upon request.

## Timing and Manner of Disclosures

Both plan-related and investment-related disclosures must be made on or before the date an individual becomes eligible to be a participant or beneficiary under the plan and at least annually thereafter. Participants and beneficiaries must also be given a description of any material changes to the required information within 30 days of their adoption. Amounts charged to an individual's account for administrative and individual services must be disclosed at least quarterly.

The initial and annual notice may be distributed with benefit statements or provided in the summary plan description, as long as distributed at the times required. Certain other information that must be provided quarterly may generally be included as part of the quarterly benefit statement.

***BUCK COMMENT.*** *The prescribed timing of these notices could be problematic for plans that provide eligibility on the first day of employment and for plans that provide for automatic enrollment. Further, it is unclear when changes in disclosures are deemed material or adopted. It is hoped that the DOL will address these issues in final regulations.*

## Interaction With ERISA Section 404(c)

If the requirements of ERISA Section 404(c) are satisfied, fiduciaries are generally relieved of liability for investment losses that result from a participant's direction. The DOL has included amendments to its Section 404(c) regulations to integrate these requirements and avoid having different disclosure rules for those who elect to comply with Section 404(c). One provision clarifies that the relief available under Section 404(c) does not extend to a fiduciary's duty to prudently select and monitor investment managers and funds under the plan.

## Effective Date

The regulations are proposed to take effect for plan years beginning on or after January 1, 2009. Comments on the proposed regulations may be submitted on or before September 8, 2008.

***BUCK COMMENT.*** *Given the breadth of these new disclosure requirements, it would be virtually impossible for most plan fiduciaries to meet this effective date. Commenters are expected to make this known to the DOL.*

## Conclusion

Although recordkeepers, investment companies and other plan vendors will be able to provide many of the required disclosures, plan sponsors must be prepared to add any other required disclosures and to coordinate with other service providers to obtain the required information. Buck's consultants would be pleased to assist you in preparing to meet the new and expanded disclosure requirements for participant-directed individual account plans.

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*This FYI is intended to provide general information. It does not offer legal advice or purport to treat all the issues surrounding any one topic.*