

MEMO# 22742

July 29, 2008

DOL Proposes Plan Participant Disclosure Rules

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TO: PENSION MEMBERS No. 44-08TRANSFER AGENT ADVISORY COMMITTEE No. 36-08BANK, TRUST AND RECORDKEEPER ADVISORY COMMITTEE No. 22-08BROKER/DEALER ADVISORY COMMITTEE No. 23-08OPERATIONS COMMITTEE No. 12-08 RE: DOL PROPOSES PLAN PARTICIPANT DISCLOSURE RULES

The Department of Labor proposed new disclosure rules for participants and beneficiaries in participant-directed defined contribution plans.[\[1\]](#) The new rules would require that participants receive basic information on the plan and its designated investment options upon becoming eligible and annually, with access to more information online and upon request, and require that expenses charged to a participant's account at the plan level for administrative services be disclosed quarterly. These requirements would apply under ERISA's general fiduciary rules and regardless of whether or not the plan is an ERISA section 404(c) plan. Under the proposal participants would receive on eligibility and annually thereafter a comparative chart (using a model in the proposal or other comparative format) on the plan's investment options and would receive copies of prospectuses (including summary prospectuses) upon request.

In general terms, the proposal would implement a long-standing Institute priority that participants in 401(k) and similar plans receive basic investment information on the investments on the plan's menu, regardless of type of investment.[\[2\]](#)

Comments on the proposal are due by September 8. DOL proposes to make the regulation effective for plan years beginning on or after January 1, 2009, and specifically asked for

comments on the proposed effective date.

Structure of the Proposal

DOL proposes to add a new regulation (29 C.F.R. § 2550.404a-5) under the general fiduciary duty rules of ERISA that would interpret section 404(a) to require fiduciaries of participant-directed defined contribution plans to take steps to ensure that participants, on a regular and periodic basis, are made aware of their rights and responsibilities and are provided sufficient information regarding the plan's designated investment alternatives. The bulk of the new proposed regulation sets out what fiduciaries must do to comply with this disclosure obligation. DOL also proposes to amend its existing regulation under section 404(c) of ERISA to harmonize the new general disclosure requirements with what is required to comply with section 404(c).

The disclosure is divided into two parts:

- disclosure of plan related information, such as general information about how to give investment directions, information on administrative expenses, and information on expenses for specific services; and
- disclosure of investment information.

Generally, the information must be based on the latest information available to the plan and written in a manner calculated to be understood by the average participant. Except as noted below, fees and expenses can be expressed in terms of a monetary amount, formula, percentage of assets, or per capita charge.

Disclosure of Plan-Related Information

At eligibility and annually thereafter. Plan-related information must be provided on or before the day of eligibility and annually thereafter. This includes:

Not later than 30 days after the date of adoption of any material change in items 1-5, the participant must be furnished a description of the change.

DOL states that this information may be provided as part of the summary plan description or as part of the new PPA quarterly benefit statement, provided the timing requirements are met.

Quarterly. At least quarterly, the participant must be furnished a statement that includes the dollar amount actually charged (formulas are not allowed) during the preceding quarter for plan or individual administrative expenses (items 6 and 7 above), and a description of the services provided to the participant for the charges. DOL states that this information may be provided as part of the new PPA quarterly benefit statement.

Disclosure of Investment Related Information

Under the proposal, investment related information is in three parts—information provided upon eligibility and annually thereafter, information provided subsequent to investment, and information provided upon request.

At eligibility and annually thereafter. For each designated investment alternative, the participant must be furnished:

Performance data must be expressed as average annual total return^[3] of the investment for the preceding 1, 5, and 10 years, measured as of the end of the applicable calendar year. In addition, the participant must be furnished the name and returns over the same periods of an appropriate broad based securities market index.^[4] Investments for which the return is fixed for the term of the investment would disclose, instead of the foregoing, the fixed rate of return and the term of the investment.

The required disclosure of fee and expense information must describe the amount and a description of each shareholder-type fee (i.e., fees charged directly against a participant's or beneficiary's investment),^[5] and the total annual operating expenses of the investment expressed as a percentage (e.g., expense ratio).^[6] Investments for which the return is fixed for the term of the investment instead disclose the amount and description of any shareholder-type fees applicable to purchase, transfer or withdrawal.

The information required above must be furnished in a chart or similar format designed to facilitate comparison of the plan's designated investment alternatives. DOL states that none of the proposed rules would preclude a fiduciary from including additional information that the fiduciary determines appropriate for comparisons, provided the information is not inaccurate or misleading.

The proposal includes a model comparative chart for investment option disclosure.^[7] A fiduciary that accurately completes the model would be deemed to have satisfied the requirement to disclose information in a comparative format. DOL states in a footnote that the information in the model is illustrative only and it is the responsibility of each plan fiduciary to assure itself that the information is complete and accurate. DOL notes that fiduciaries will not be liable for reasonable and good faith reliance on information furnished by service providers with respect to investment related disclosures.

In disclosing information at or before date of eligibility, the plan may use the most recent annual disclosure furnished to existing participants and any material changes to the general plan-related information.

Subsequent to investment. Participants must be provided any materials provided to the plan relating to the exercise of voting, tender, and similar rights appurtenant to the investment, to the extent participants have these rights under the plan.

Upon request. Participant must be provided upon request:

- copies of prospectuses (or any short-form or summary prospectus approved by the SEC) for entities registered under either the Securities Act of 1933 or the Investment Company Act of 1940, or similar documents relating to designated alternatives that are provided by unregistered entities;^[8]
- copies of any financial statements or reports, such as statements of additional information and shareholder reports, and any other similar materials relating to the plan's designated investment alternatives, to the extent the materials are provided to the plan;
- a statement of the value of a share or unit of each designated investment alternative as well as the date of the valuation; and
- a list of the assets comprising the portfolio of each designated investment alternative that constitute plan assets and the value of each such asset (or the proportion of the investment that it comprises).

The investment information required under the regulation applies to a "designated investment alternative." DOL defines this to mean an investment alternative designated by the plan into which participants may direct the investment of assets held in, or contributed to, their individual accounts. The term does not include "brokerage windows," "self-directed brokerage windows," or similar plan arrangements that enable participants to select investments beyond those designated by the plan.

Section 404(c) Changes

DOL proposes to amend the existing 404(c) regulation, 29 C.F.R. § 2550.404c-1, to establish a uniform disclosure framework for all participant directed individual account plans. For example, references to investment information that must be provided automatically or upon request (subparagraph (b)(2)(i)(B)) would be replaced with cross-references to the new rules. Other requirements of the section 404(c) regulation, such as the requirement to offer at least three diversified investment alternatives with materially different risk and return characteristics, would still apply.

Fiduciary Duty to Select and Monitor

DOL states in the preamble to the proposal that it is taking this opportunity to reiterate its long held position that relief afforded by section 404(c) does not extend to a fiduciary's duty to prudently select and monitor designated investment alternatives. DOL proposes to incorporate a statement to this effect into the changes to the section 404(c) regulation. DOL also proposes to include a statement in the new general regulation that nothing in the regulation would relieve a fiduciary from the duty to prudently select and monitor service providers and investments made available under the plan.^[9]

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^[1] A copy of DOL proposal is available here:

<http://www.dol.gov/federalregister/PdfDisplay.aspx?DocId=20973>.

^[2] The Institute's Board of Governors adopted a policy statement in January of 2007

reiterating this goal. For a copy of the Institute's Policy Statement, see http://www.ici.org/statements/ppr/ppr_07_ret_disclosure_stmt.pdf.

[3] DOL defines average annual total return as the average profit or loss realized by a designated investment alternative at the end of the specified period, calculated in the same manner as average annual total return is calculated under Item 21 of Form N-1A for mutual funds.

[4] The phrase "appropriate broad based securities market index" is the phrase used in Form N-1A. As in Form N-1A, the index may not be administered by an affiliate of the investment provider, unless the index is widely recognized and used.

[5] DOL gives as examples of "shareholder-type fees" the following: sales loads, sales charges, deferred sales charges, redemption fees, surrender charges, exchange fees, account fees, purchase fees, and mortality and expense fees.

[6] DOL defines total annual expenses as the annual operating expenses of the designated investment alternative (e.g., investment management fees, distribution, service, and administrative expenses) that reduce the rate of return, expressed as a percentage and calculated in the same manner as in Instruction 3 to Item 3 of Form N-1A for mutual funds.

[7] A copy of the model comparative chart is available here:
<http://www.dol.gov/ebsa/modelcomparativechart.doc>.

[8] While this information is similar to that currently required under section 404(c), one significant change is that mutual fund prospectuses would be required to be provided upon request, and not automatically upon the participant's initial investment.

[9] In a footnote in the preamble, DOL states that "there may be extraordinary situations when fiduciaries will have a disclosure obligation beyond those addressed by this regulation. For example, if a plan fiduciary knew that, due to a fraud, information contained in a public financial report would mislead investors concerning the value of a designated investment alternative, the fiduciary would have an obligation to take appropriate steps to protect the plan's participants, such as disclosing the information or preventing additional investments in that alternative by plan participants until the relevant information is made public."