

CLIENT ACTION BULLETIN

August 28, 2008

CAB 08-18R

DOL Proposes Participant Disclosure Rules for Defined Contribution Plans

SUMMARY The Department of Labor (DOL) recently issued proposed regulations on information plan fiduciaries must regularly disclose to plan participants in participant-directed retirement plans. The proposed rule, which would significantly expand current disclosure requirements, would apply to all ERISA-covered plans that give participants the right to direct the investments in their accounts, such as 401(k), 403(b), and profit-sharing plans, as well as plans that currently comply voluntarily with section 404(c) of ERISA.

In general, the proposed rule specifies the plan-related and investment-related information that fiduciaries must disclose, along with the form and timing of the disclosures. The DOL proposes that the rule be effective for plan years beginning on or after January 1, 2009, a date by which most plans will find compliance difficult, given the information-gathering, formatting, communications, and administrative requirements called for by the regulation. [The DOL likely will seriously consider a later effective date, since many plan sponsors and benefits practitioners—including Milliman—are detailing their concerns about the complex, time-consuming processes that must be addressed for compliance.]

DISCUSSION Background

The proposed rule is the third of three recent disclosure initiatives undertaken by the DOL to ensure that plan fiduciaries and participants understand the fees and expenses charged to the plan and its designated investment alternatives, and the impact they have on individual participants' account balances. Late last year, the DOL proposed regulations to require plan service providers to disclose all the direct and indirect compensation they receive for plan-related services, as well as any conflicts of interest they may have in their capacity as service providers. The DOL earlier this year promulgated a final rule on fiduciary reporting of these service provider disclosures on the revised Form 5500's Schedule C (see [Client Action Bulletin 08-17](#)).

Proposed Initial, Annual, and Quarterly Disclosures

Under the DOL's proposed regulations, a plan fiduciary would have to disclose four kinds of information to plan participants initially (i.e., on or before the date they first become eligible to participate in the plan), and then at least annually (i.e., at least once in any 12-month period) and in some cases quarterly (i.e., at least once in any 3-month period), after they are enrolled in the plan. These notices could be provided with benefit statements or other materials that all participants receive. In addition, the annual notices may be provided as part of a summary plan description (SPD) if it is distributed on an annual basis.

The four broad categories of information that would have to be disclosed initially, annually, and/or quarterly are:

- **General Plan Information:** This category includes a list of the plan's investment options, an explanation of how participants are to communicate their investment choices and changes, and a description of any restrictions that apply to choosing or changing investments. A description of any voting or other rights associated with an investment option would have to be provided once a participant invests in that specific option. Participants also would have to be notified of any "material change" to the plan within 30 days of the change being adopted. Changing investment options (whether by adding a new option or eliminating an existing one) or changing investment managers would be considered material changes.
- **General Administrative Expenses:** A plan fiduciary would have to disclose administrative expenses that are charged to individual participant accounts, including recordkeeping, legal,

and accounting fees. (These expenses are considered administrative expenses insofar as they are separate from the investment-related fees and expenses.) Fiduciaries would have to describe how expenses are charged to, or affect, individual account balances (e.g., as a set fee per person or a percentage of assets).

- **Individual Administrative Expenses:** Administrative charges that are assessed individually, such as fees pertaining to qualified domestic relations orders (QDROs), loan processing, hardship distributions, or investment advice, would have to be disclosed. *At least every quarter* (i.e., at least once in any 3-month period), fiduciaries would have to give each participant a statement detailing the actual dollar amounts charged to his or her account in the preceding quarter for both general and individual administrative services. This notice may be distributed with the quarterly benefit statement.
- **Investment-Related Information:** A fiduciary would have to give participants general information about the plan's investment options, their historical performance, and their fees and expenses. The proposed rule includes a sample chart that is a safe-harbor minimum standard for how sponsors convey this information, although plan sponsors could choose to provide more information, as long as it is accurate and not misleading. The general information to be disclosed is quite basic: investments' names, their investment category, whether they are actively or passively managed, and relevant web site addresses (with a note that participants may find more current investment information there).

The required investment performance history would include one-year, five-year, and 10-year investment results, when available, for each investment option. An appropriate benchmark for the same time periods must be given, so the plan options' relative investment performance could be readily understood by participants. The fees and expenses that pertain to each investment would also have to be disclosed. These include sales charges, sales loads, redemption fees, deferred sales charges, surrender charges, and mortality and expense fees. The annual operating costs of the investment would have to be given as a percentage of the assets under management.

Fiduciaries would be required to add a caveat to the effect that fees and expenses are only one aspect participants and beneficiaries should consider when choosing an investment.

These investment disclosure rules would apply to the entire universe of a plan's designated investment alternatives, including bank collective funds and insurance separate accounts, not just to investments regulated by the Securities and Exchange Commission. The rules would not apply to brokerage windows, self-directed brokerage accounts, or other arrangements that allow participants to choose investments outside those designated by the plan.

Notices Supplied by Request Only

Some information that currently is required would only have to be provided upon request. This information includes: copies of investment prospectuses or summaries, investment financial statements and reports, share values of particular investments, and a list of the specific assets held in an investment's portfolio and their individual worth or weighting in the portfolio.

ACTION

The DOL's proposed rule entails significant administrative and preparatory actions for plan sponsors and fiduciaries. They need to begin developing the necessary systems to track and capture the information to be disclosed by their plans to individual participants in the event the DOL preserves much of its proposal in the final rule and adheres to its planned effective date. They will have to create appropriate communications materials to convey the required information, test administrative systems, modify or create web sites, revise SPDs, and possibly amend their plans and other governing documents. Fiduciaries should begin to initiate discussions with their plan service providers.

For more information on the DOL's disclosure regulations or for assistance implementing their requirements, please contact your Milliman consultant.