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Client Alert:
Employee Benefits

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# *Preparing For The Next Retirement Plan Disclosure Deadline: New Participant Disclosures*

**Overview**

With just two months left before new participant-level disclosures must be made, some plan administrators may be surprised to learn that their outside service provider(s) will not take full responsibility for providing complete and accurate disclosures. The new disclosure regulations affect plan administrators of individual account retirement plans (401(k), 403(b), profit sharing) that allow participants to make investment decisions. They generally require that employees be given, or have access to, specifically prescribed (1) investment information, (2) fee and expense information, and (3) plan information.

**What Do the New Disclosure Regulations Require?**

New regulations under section 404(a) of the Employee Retirement Income Security Act of 1974 ("ERISA") require plan administrators to provide specified disclosures by the later of August 30, 2012 or 60 days after end of first plan year starting on or after November 2011. These disclosures must be provided to each participant or beneficiary who has the right to make investment decisions regarding an individual account within a group retirement plan. The content of the disclosures and the method for making the disclosures are set forth in the regulations and related guidance, with a fair level of specificity. The categories of information that must be disclosed include information concerning the plan's designated investment options, fee and expense information, and plan-related information. Many plan service providers have informally agreed to prepare all of the required disclosures, but may not contractually agree to provide disclosures that are legally-compliant. Other service providers have agreed to provide some, but not all, of the categories of required disclosures. It is the last of the three categories listed above – plan-related information – that is most likely to be left to the plan administrator to prepare.

**What Plan-Related Information Must Be Disclosed?**

Three general types of plan-related information must be disclosed: general plan information, administrative expenses information, and account-level/individual expenses information. The information in these three subcategories must be given to participants on or before the date they can first direct their investments, and then again annually thereafter. If the information changes mid-year, mid-year supplemental disclosures are also required.

***General Plan Information***

General plan information consists of information about the structure and mechanics of the plan, such as an explanation of how to give investment instructions under the plan, a list of the plan's current investment options (known as "designated investment alternatives" or "DIAs"), and a description of any "brokerage windows" or similar arrangements that enable the selection of investments beyond the DIAs. In order to ensure that the required general plan information disclosures are made, the plan administrator must ensure that the disclosures:

1. Explain how participants may give investment instructions.
2. Explain any limits on permissible investment instructions, such as market timing restrictions, or equity wash provisions affecting the liquidation of a stable value investment.
3. Describe (or refer to) plan provisions regarding exercise of proxy voting or other rights associated with DIA investments, and any restrictions on such rights.
4. Identify each DIA.
5. Identify any designated investment manager(s).
6. Describe any brokerage window or similar arrangement.

*Note:* The Department of Labor recently issued guidance stating that an investment made through a brokerage window will be considered a DIA if a significant number of plan participants have chosen the same investment product. This means that plan fiduciaries must monitor investment activity conducted through a plan's brokerage window in order to determine whether any individual investment product must be considered a DIA.

***Administrative Expenses Information***
The administrative expense information disclosures require disclosure of any fees and expenses for general plan administrative services that may be charged to or deducted from all individual accounts. Examples include fees and expenses for the plan's legal, accounting, and recordkeeping services.

***Individual Expenses Information***
The individual expense information disclosures require an explanation of any fees and expenses that may be charged to or deducted from the individual account of a specific participant or beneficiary as a result of the activities of that person. Examples include fees and expenses for plan loans and for processing qualified domestic relations orders.

**What Else is Required, Beyond Plan-Related Information?**

Plan administrators are also legally responsible for providing a number of other specific types of participant-level disclosures, including the following:

1. **Statements Showing Deductions**. Participants must be provided statements, at least quarterly, showing the dollar amount of the plan-related fees and expenses actually deducted from their individual accounts, along with a description of the nature of the charge.
2. **Investment-Related Information**. The investment-related information described below must be furnished on or before the date the participant or beneficiary can first direct their investments, and then again annually thereafter. If there are significant changes, mid-year corrections are required. Investment information must be furnished in a chart or similar format designed to facilitate a comparison of each investment option available under the plan.The final rule includes a model comparative chart, which when correctly completed, may be used by the plan administrator to satisfy the rule's requirement that a plan's investment option information be provided in a comparative format.
   i. ***Historical Data***. Participants must be provided specific information about historical investment performance. 1-year, 5-year, and 10-year historical returns must be provided for investment options, such as mutual funds, that do not have fixed rates of return. For investment options that have a fixed or stated rate of return, the annual rate of return and the term of the investment must be disclosed.
   ii. ***Benchmarks***. For investment options that do not have a fixed rate of return, an appropriate benchmark must be identified, along with the index performance over 1-year, 5-year, and 10-year periods.
   iii. ***Investment Fees and Expenses***. For investment options that do not a have a fixed rate of return, the total annual operating expenses (stated as both a percentage of assets and as a dollar amount for each $1,000 invested) and any shareholder-type fees or restrictions on the participant's ability to purchase or withdraw from the investment. For investment options with a fixed rate of return, any shareholder-type fees or restrictions on the

participant's ability to purchase or withdraw from the investment.
iv. ***Internet Website Address***. The address of an internet website containing additional information about the plan's investment options and containing more current information.
v. ***Glossary of Investment Terms***. The address of an internet website containing a general glossary of investment terms.
vi. ***Proxy Voting Rights***. After a participant has invested in a particular investment option, the plan administrator must provide any materials the plan receives regarding voting, tender or similar rights in the option.
vii. ***Information Upon Request***. Upon request, the plan administrator must furnish prospectuses, financial reports, statements of valuation, and of assets held by an investment option.

**What Should Plan Administrators Do Now?**

The new disclosure regulations add to the administrative burdens of retirement plan administrators. In order to ensure that the disclosure obligations are met, there are a number of steps plan administrators should take now.

1. Have a detailed discussion with the plan service provider(s) that will be assisting in preparing and distributing the required disclosures on behalf of the plan administrator, to ensure that the service provider will prepare each category of required disclosure.
2. If the service provider will not prepare or provide a specific type of information, such as the plan-related disclosure information, then the plan administrator must prepare and provide the required disclosure information.
3. Carefully review in advance all disclosures from the plan service provider to ensure that the scope is adequate.
4. Any participant-level disclosures distributed in an electronic format must meet the Department of Labor's electronic disclosure regulations in order to meet the disclosure requirement, or they will be treated as if they were not provided.
5. Renegotiate the plan service provider's contract to specifically require the service provider to prepare and distribute participant-level disclosures that are legally compliant. The regulations give plan administrators protection from liability for the completeness and accuracy of information provided to participants if the plan administrator reasonably and in good faith relies upon information provided by a plan service provider. If the service provider disavows any responsibility for preparing complete, accurate, and timely disclosures, reliance on the service provider may not be "reasonable."

Butzel Long's Employee Benefits Practice Group is available to discuss the steps necessary to comply with the laws and to fully protect the plan administrator, including assisting with reviewing disclosures provided by service providers and preparing plan-related disclosure information.

If you have any employee benefit questions, please contact your regular Butzel Long attorney, a member of the Butzel Long Employee Benefits Practice Group, or the author of this Client Alert.

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