# ACTION NEEDED TO COMPLY WITH DEPARTMENT OF LABOR FEE DISCLOSURE REQUIREMENTS

*Employee Benefits Alert*
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Plan administrators of calendar-year defined contribution plans that allow participants and beneficiaries to direct the investment of their individual accounts must make significant disclosures to those participants and beneficiaries no later than August 30, 2012 (see chart below for deadlines for fiscal year plans). We previously discussed the final regulation giving rise to the required participant fee disclosures in our November 2010 newsletter. The Department of Labor (DOL) recently supplemented the final regulation with guidance in the form of questions and answers. Additional guidance was provided on July 30, 2012.

Among other topics, the DOL's supplemental guidance addresses:

- 403(b) plans required to make participant disclosures (Q & A-2)
- The disclosure of general administrative expenses (Q & A-5 through 12)
- Disclosures related to self-directed brokerage accounts and similar arrangements (Q & A-13, 14, 29, and 39)
- Use of "blended" benchmarks (Q & A-16)
- Compliance with the final regulation's website requirement (Q & A-17 through 19)
- The availability of sample glossaries for investment terminology (Q & A-20)

This article discusses certain aspects of the DOL guidance and immediate actions steps that should be taken by plan sponsors and administrators, as the deadline is quickly approaching.

## Action Steps

By now, *all* qualified plans—not just defined contribution plans that allow participants to direct their investments—and 403(b) plans sponsored by tax-exempt employers should have received fee disclosures from most service providers with which the plan has an arrangement. These fee disclosures must be carefully reviewed for completeness, accuracy, potential conflicts of interest, and reasonableness of compensation being received by the service provider. Moreover, in the case of an

individual account plan that allows participants to direct their investments, the information disclosed by service providers may be needed to complete the participant-level fee disclosure.

Plan administrators required to make participant-level fee disclosures should evaluate what disclosures they are required to make and the level of detail they are required to provide in light of the DOL's supplemental guidance. In cases where a service provider is to prepare a draft of the participant disclosure, the plan administrator should *carefully* review that disclosure for completeness and accuracy. At this point, we have already reviewed a number of draft participant disclosures prepared by service providers, and we have found many to be either incomplete or inaccurate.

In light of the lack of current guidance, plan sponsors of plans allowing participants and beneficiaries to invest in self-directed brokerage accounts and similar arrangements (collectively referred to herein as SDBAs) should monitor developments and consider the discussion below.

## Administrative Expense Disclosures

The DOL's guidance makes a number of pronouncements on the annual disclosure of general administrative expenses. Q & A-5, in particular, is noteworthy in demonstrating the degree of specificity the DOL expects in a disclosure. In it, the DOL explains that in situations where fees for a given service are known, the annual disclosure must clearly identify the service (e.g., recordkeeping), the cost of that service (e.g., 12 percent of the participant's account balance or $25 per participant), and the plan's allocation method (e.g., pro rata).

Meanwhile, Q & A-7 reinforces the principle that disclosure is only required when administrative expenses are actually charged against participants' individual accounts and not reflected in the total annual operating expenses of the plan's designated investment alternatives. The fact pattern deals with a plan that provides for administrative expenses to be paid solely from the plan's forfeiture account or by the plan sponsor. Since any administrative expenses would not be charged against participants' individual accounts under these circumstances, annual disclosure of administrative expenses is not required.

Moving one step beyond the facts in Q & A-7, Q & A-8 deals with the situation where the plan provides for administrative expenses to be paid from 1) participants' accounts, 2) from the plan's forfeiture account, or 3) from the plan sponsor's general assets, at the plan sponsor's discretion. The plan sponsor has always paid administrative expenses either from the plan's forfeiture account or its own general assets. Although the DOL's answer is somewhat muddied due to the existence of a written commitment to pay plan administrative expenses by the plan sponsor, the DOL concludes that annual disclosure of administrative expenses is not required in these circumstances. However, if administrative expenses were later charged against participants' individual accounts, disclosure of administrative expenses would be required.

## Self-Directed Brokerage Accounts and Similar Arrangements

**Investment-related disclosures**. In its initial supplemental guidance, the DOL surprised many practitioners with Q & A-30. In it, the DOL cautioned that plan fiduciaries failing to designate a manageable number of investment alternatives could face questions as to whether their fiduciary obligations were met. The DOL also advised that plan fiduciaries have an obligation to monitor participants' investment in non-designated investment alternatives such as SDBAs. If a significant number of participants and beneficiaries selected a particular investment through the SDBA, a fiduciary would be required to examine whether that investment should be made a designated investment alternative. In terms of the final regulation, the distinction between designated and non-designated investment alternatives lies in the requirement to make investment-related disclosures for designated investments alternatives but not for non-designated investment alternatives such as SDBAs. A safe harbor disclosure for SDBAs was provided by the DOL in cases where an SDBA platform holds more than 25 investment alternatives.

Following an outcry from the retirement plan community, the DOL issued its July 30, 2012 guidance rescinding Q & A-30 and adding Q & A-39. In Q & A-39, the DOL reiterates that SDBAs are not designated investment alternatives. Thus, no investment-related disclosure is required. With Q & A-30 being rescinded, plan administrators need not consider whether disclosure should be made under the "optional" safe harbor for SDBAs.

However, this is not to say that plan fiduciaries may look the other way when it comes to SDBAs. The DOL added that "a plan fiduciary's failure to designate investment alternatives, for example, to avoid investment disclosures under the regulation, raises questions under ERISA section 404(a)'s general statutory fiduciary duties of prudence and loyalty." Also, these duties of prudence and loyalty require fiduciaries to take into account the nature and quality of services provided in connection with SDBAs.

**Plan-related disclosures**. The final regulation was nondescript on the level of detail required when making plan-related disclosures for SDBAs. The supplemental guidance makes clear that a participant disclosure must provide a general description of the SDBA, including how and to whom to give investment instructions, any account balance requirements, any restrictions or limitations on trading, how the SDBA differs from the plan's designated investment alternatives, and whom to contact with questions.

In addition, the plan administrator must disclose any fees and expenses that may be charged against a participant's account in connection with opening, maintaining access to, and closing the SDBA. Commissions and other fees associated with the purchase or sale of a security must also be disclosed, unless these transaction-based fees are so varied as to risk overwhelming participants with information on the various costs. In such cases, the participant should be directed to ask the SDBA provider about any transaction-based fees.

## Timing of Disclosures

The following chart details the deadlines for providing the required annual and quarterly disclosures to participants and beneficiaries who may direct the investment of their accounts in the plan: **Plan Year Ending Annual Disclosure Due Date First Quarterly Disclosure Due Date** October 31 August 30, 2012 November 14, 2012 November 30 August 30, 2012 November 14, 2012 December 31 August 30, 2012 November 14, 2012 January 31 August 30, 2012 November 14, 2012 February 29 August 30, 2012 November 14, 2012 March 31 August 30, 2012 November 14, 2012 April 30 August 30, 2012 November 14, 2012 May 31 August 30, 2012 November 14, 2012 June 30 August 30, 2012 November 14, 2012 July 31 September 30, 2012 November 14, 2012 August 31 October 31, 2012 February 14, 2013 September 30 November 30, 2012 February 14, 2013