ERISA/Employee Benefits Advisory

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Deadline Looms for New Requirement to Disclose Fees to Retirement Plan Participants

By Lynn K. Brehm and John H. Wilson

Virtually all 401(k) plans (and some other similar retirement plans) will soon have to meet significant new reporting and disclosure requirements imposed on plan administrators. Under these new requirements, a substantial amount of additional fee and expense information will have to be reported to individuals who are eligible to participate under those plans.

There has been some uncertainty and confusion about when plan administrators would first be required to meet these new participant fee disclosure requirements. It is more and more likely, however, that the final effective date will be January 1, 2012.

This reporting requirement is new and will be complicated. It is also potentially going to be very burdensome and difficult to manage properly. Moreover, much of the information needed to meet these reporting and disclosure standards may have to come from third party service providers. For these reasons, employers, in their roles as plan sponsors and plan administrators, are encouraged to take appropriate action now and over the next few months to understand and plan ahead for this new reporting and disclosure requirement.

With a deadline that is less than six months away, plan administrators should now be asking what this means for them. This Advisory only sets out the basics of what plan administrators should know in order to start to get ready to meet these new requirements. More detailed review may be necessary.

Here are the who, what, when and how of the key requirements that will be important to plan administrators:

Who does this apply to?

Plan administrators of any individual account retirement plan that allows for participant-directed investments (this includes, but is not limited to, ERISA 404(c) participant-directed plans) must comply. This means the new requirements extend to all those retirement plans, most typically 401(k) plans, that allow participants to choose their own investments. Only a few participant-directed investment individual account plans are excepted from these requirements (namely, simplified employee pension plans (IRC 408(k)) and simple retirement accounts (IRC 408(p))).

What must plan administrators do to meet their legal duties?

Plan administrators are required to report and disclose both all "plan-related information" and all "investment-related information". While the requirements are more detailed and specific, this information is generally described as follows:

"Plan-related information" is all of the information on the procedures for giving investment instructions, the limitations on such instructions, the type of investments available under the plan, the rights and restrictions on the investments, and a description of all of the individual and general administrative expenses, if any, charged under the plan.

"Investment-related information" is all of the information on the name, category, performance benchmarks, fees and expenses, web site address and any applicable forms of payment applicable to each investment option, including an explanation of terms used to describe the details of the investments. This information is required to be provided in a "comparative" format, such as a chart or matrix, that allows eligible employees to compare easily all of the investment options. (Note that, for some investment options, comparison can be difficult and so there are specific disclosure rules for the following types of special investments: brokerage windows, target date funds, investment options offering annuity income and employer stock features.)

When must plan administrators provide the required information?

As explained above, these requirements go into effect on January 1, 2012. However, plan administrators are not actually required to deliver the information until 60 days (which is proposed to be extended to 120 days) after the effective date. Thus, some additional time has been allowed, but the process of identifying, collecting and formatting the disclosure report should begin soon, if it has not already begun.

Following the initial disclosure, information must be provided to eligible employees and beneficiaries:

- annually,
- on or before the date they can first direct investments under the plan, and
- upon request.

In addition to the above, at least quarterly, participants and beneficiaries must be provided with a statement listing the dollar amount of fees and expenses, for both individual and general plan-level administrative services, charged to their individual accounts and a description of the services to which the fees and expenses relate.

How do plan administrators begin to take steps necessary to comply?

While the specific steps that must be taken in order to comply depend in some major part on the cooperation of service providers and the terms of the plan document, here are some recommended general action items:

- *Talk with third-party service providers*. If they have not already done so, third-party service providers (that is, your plan's record keeper or account manager) should be able to provide a briefing and explanation of how the service provider intends to cooperate and work with your retirement plan to deliver the required reporting.

  > **Warning:** The plan administrator (typically, the employer) will be fully responsible for making sure this is done correctly. While third-party service providers might prepare materials to give to eligible employees, third-party service providers routinely disclaim responsibility for legal compliance of any materials they provide. As such, it is very important that plan administrators fully evaluate those materials before providing them to eligible employees.

- *Gather investment information.* Given the nature of the specific investment information that needs to be disclosed, plan administrators must rely on their service providers to give them the information. If not, plan administrators will need to determine how else they may be able to get this information. In order to make sure there is enough time to compile the information into a legally-sufficient disclosure, the initial request for this information should be made to the service providers as soon as possible.

  Unique and special investment options, like self-directed brokerage windows, employer stock or target retirement funds, should also be considered. Decisions will have to be made about how best to obtain, report and disclose the relevant information for these types of investment options.

Be aware that a service provider might require an amendment to its services agreement before they will provide this information. An amendment might cover the specific information to be disclosed, the timing for providing such information and the responsibility for compliance. If so, plan administrators will want to finalize this amendment as soon as possible, after review for legal compliance.

- *Gather plan-related information.* Information on plan-level (compared to investment based) expenses charged (e.g., expenses for accountants, record keepers) and individual account-level expenses charged (e.g., loan fees, QDRO review fees) will need to be compiled in order to report these amounts on the disclosures (quarterly). This is information that, for the most part, the plan administrator should generally have access to in its files and records, but help in compiling this may also be needed from the service provider.

- *Consider plan amendments.* If the plan document specifically mentions disclosures that must be provided to participants, which could include the timing and content of the disclosure, a plan amendment might be needed to the plan document for this new requirement. Plan administrators should review their plan document to determine whether an amendment is needed.

- *Collect eligible employee and beneficiary information.* Since disclosures must be provided to all eligible employees, not just employees that participate in the plan, and to all beneficiaries (e.g., death beneficiaries, QDRO alternate payees) who have the right to invest their benefits under the plan, plan administrators should make sure that they have this necessary contact information ready for when it is time to provide the disclosure.

- *Prepare a mock draft of the disclosure.* Once all necessary information has been gathered, the plan administrator should begin to prepare a mock draft of the disclosure. Depending upon the format in which the service provider gives the information, this may require the plan administrator to prepare a comparative chart.

- *Consider how to distribute the disclosure.* Ordinarily, the disclosure must be provided in a hard copy written format. The disclosure can be included as part of other written materials, such as a summary plan description or a benefit statement, or can be given as a stand-alone notice. Only if the plan complies with all of the general electronic disclosure requirements set forth under the federal employee benefits law (ERISA), the disclosure can be provided electronically.

While the entire required process will be a challenge, it is best to take steps now to begin to prepare and develop a legally compliant disclosure, as this will ease pressures for the initial disclosure and simplify the process for making annual revisions to the disclosure in the future.

For more information, email the author(s) at **firmadvisory@bipc.com**.