

WSGR ALERT

DECEMBER 2010

DEPARTMENT OF LABOR ISSUES FINAL REGULATIONS ON 401(K) PLAN DISCLOSURE REQUIREMENTS

On October 14, 2010, the U.S. Department of Labor (DOL) released final regulations regarding the disclosure requirements for Internal Revenue Code Section 401(k) plans. The regulations expand the disclosure a plan administrator must provide about retirement plan fees and expenses under the Employee Retirement Income Security Act of 1974 (ERISA). The regulations also create a uniform disclosure regime for all participant-directed 401(k) plans, regardless of whether a plan is covered by Section 404(c) of ERISA.

The final regulations apply to plan years beginning on or after November 1, 2011, including calendar-year plans beginning on January 1, 2012.

Background

Participants¹ in 401(k) plans are typically responsible for their own investment decisions. However, the DOL requires plan fiduciaries to make certain disclosures to participants to enable them to direct investments more prudently. The disclosures are required as part of a fiduciary's obligations under the exclusive purpose and prudence rules of ERISA. The new regulations do not apply to IRAs.

The new regulations are in addition to existing regulations regarding information to be disclosed to plan participants, including rules in the three following areas: (1) general plan-related and expense information; (2) specific information about the administrative

expenses and individual expenses actually charged to a participant's account; and (3) investment-related information, at least annually and upon request.

General Plan-Related and Expense Information

Participants must be furnished the following plan-related information both before the date of plan eligibility and at least annually thereafter:

- An explanation of the circumstances under which investment instructions may be given
- An explanation of any specified limitations on such instructions (e.g., restrictions on transfer to or from a designated investment alternative)
- A description of (or a reference to) plan provisions relating to the exercise of voting, tender, and similar rights applicable to an investment in a designated investment alternative, as well as any restrictions on such rights
- A list of each designated investment alternative offered under the plan
- A list of any designated investment managers
- A description of any brokerage windows, self-directed brokerage

accounts, or similar plan arrangements that enable participants to select investments beyond those designated by the plan

- An explanation of any fees and expenses for plan administrative services that may be charged to the plan and the basis on which such charges are allocated to account balances (e.g., pro rata, per capita). Administrative services might include legal, accounting, or recordkeeping services, and any other expenses that are not investment-related.
- An explanation of any fees and expenses that may be charged for services provided on an individual basis. Examples include loan processing fees, fees for qualified domestic relations orders issued against the participant, and investment advice fees.

Plan-related and expense information must be disclosed before the date of plan eligibility and at least annually thereafter. The information may be provided as part of the plan's summary description or as part of a benefit statement. The information must be written in a manner calculated to be understood by the average plan participant.

If there is any change to the information, each participant must be furnished a description of such change at least 30 days,

¹ For the purposes of this WSGR Alert, the term "participant" includes beneficiaries.

Continued on page 2...

Department of Labor Issues Final Regulations . . .

Continued from page 1...

but not more than 90 days, in advance of the effective date of such change. If unforeseeable circumstances make timely notice of change impossible, notice must be furnished as soon as reasonably practicable.

Specific Administrative and Individual Expenses Allocated to Accounts

On at least a quarterly basis, participants must receive a statement that includes: (1) the dollar amount actually charged to accounts during the preceding quarter for administrative and individual expenses, and (2) a description of the services provided.

The information may be provided as part of a benefit statement.

Investment-Related Information

Fiduciaries must ensure that investment-related information on all designated investment alternatives is disclosed. The required investment information is divided into three categories: (1) information to be provided automatically; (2) voting rights information to be provided subsequent to investment; and (3) information to be provided upon request.

For the purposes of the new regulations, brokerage windows, self-directed brokerage accounts, and similar plan arrangements that enable participants to select investments beyond those designated by the plan are not designated investment alternatives. As such, fiduciaries are not required to disclose investment-related information about the universe of potential investment options available through these alternatives.

Information Provided Automatically

On or before the date of participant eligibility, and at least annually thereafter, fiduciaries must ensure that participants are furnished information (based on the latest information available to the plan) with respect to each designated investment alternative offered

under the plan. The specific type of information will vary depending on whether the alternative has fixed returns, whether it is an annuity option, and whether it consists of an investment in the employer's securities. The information must be provided in the form of charts or a similar format that is designed to facilitate a comparison of such information for each alternative available under the plan, and must prominently display applicable dates.

All Alternatives: The following information is generally required to be provided automatically for all types of designated investment alternatives:

- The name of the designated investment alternative
- The type or category of the investment (e.g., money market fund, large-cap stock fund)
- An Internet website address that is sufficiently specific to lead the individual to supplementary information regarding the designated investment alternative, and includes: (1) the name of the alternative's issuer or provider; (2) objectives and goals; (3) principal strategies and risks, including a general description of the assets comprising the alternative's portfolio; (4) the portfolio turnover rate; (5) the alternative's performance data updated on a quarterly basis; and (6) related fees and expenses
- A general glossary of terms to assist participants in understanding the designated investment alternatives, or an Internet website address that is sufficiently specific to provide access to such a glossary, along with a general explanation of the purpose of the address
- A detailed description of shareholder-type fees and expenses

Alternatives without Fixed Returns: If the alternative does not have a fixed rate of return, the disclosure also must include information on the average annual total return and past performance of the alternative.

Alternatives with Fixed Returns: If the alternative does have a fixed rate of return, the disclosure also must include information on the amount of the return and when the issuer may adjust the fixed rate of return.

Alternatives with Annuity Options: If the alternative contains an annuity option, the disclosure also must include information on the option's objectives and the benefits and factors that determine the option's price.

Alternatives with Employer Securities: If the alternative is designed to invest in the securities of the employer, the Internet website address also must include information explaining the need for a well-balanced and diversified investment portfolio.

Voting Rights Information

Subsequent to an investment in a designated investment alternative, the fiduciaries must ensure that participants are furnished any materials provided to the plan relating to the exercise of voting, tender, and similar rights appurtenant to the investment, to the extent that such rights are passed through to participants under the terms of the plan.

Information Provided Upon Request

Upon the request of a participant, a plan must furnish:

- copies of prospectuses (or summary prospectuses approved by the Securities and Exchange Commission) or similar documents relating to designated investment alternatives that are

Continued on page 3...

Department of Labor Issues Final Regulations . . .

Continued from page 2...

provided by entities that are not registered under either the Securities Act of 1933 or the Investment Company Act of 1940;

- copies of any financial statements or reports provided by 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.

Effect on Other Laws

The new disclosure regulations for Internal Revenue Code Section 401(k) plans supersede the disclosures required under ERISA Section 404(c). Under the previous rules, a violation of

the Section 404(c) disclosure rules was not necessarily actionable under ERISA as a breach of a fiduciary's disclosure obligation. Instead, a violation merely had the effect of preventing a fiduciary from claiming protection from losses resulting from a participant's exercise of control over an individual account plan. Under the new rules, failure to comply constitutes a fiduciary breach. Plan fiduciaries should work with their advisors to collect, maintain, and disseminate information required to be disclosed under the new rules.

This WSGR Alert is intended only as a general summary of the disclosure regulations. For more information on plan disclosure and the specific requirements, please contact any member of the employee benefits and compensation practice at Wilson Sonsini Goodrich & Rosati.



Wilson Sonsini Goodrich & Rosati
PROFESSIONAL CORPORATION

This WSGR Alert was sent to our clients and interested parties via email on December 7, 2010. To receive future WSGR Alerts and newsletters via email, please contact Marketing at wsgr_resource@wsgr.com and ask to be added to our mailing list.

This communication is provided for your information only and is not intended to constitute professional advice as to any particular situation. We would be pleased to provide you with specific advice about particular situations, if desired. Do not hesitate to contact us.

650 Page Mill Road
Palo Alto, CA 94304-1050
Tel: (650) 493-9300 Fax: (650) 493-6811
email: wsgr_resource@wsgr.com

www.wsgr.com

© 2010 Wilson Sonsini Goodrich & Rosati,
Professional Corporation
All rights reserved.