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DOL Publishes Participant Disclosure Regulation

By Mark A. Amadeo, Esq.

On October 20, 2010, the U.S. Department of Labor published its long-awaited final regulation that requires plan administrators to disclose two categories of information — plan-related information and investment-related information — to participants and beneficiaries of participant-directed individual account plans, including 401(k) plans. Although effective on December 20, 2010, the rule does not apply to a plan until the first plan year that begins on or after November 1, 2011. Consequently, for calendar year plans, the rule will apply on January 1, 2012. The regulation can be found at http://webapps.dol.gov/FederalRegister/PdfDisplay.aspx?DocId=24323.

Under the final regulation, plan administrators are responsible for providing the disclosures not only to employees actually enrolled in a plan, but also to employees who are not enrolled but who are eligible to participate in the plan. A beneficiary that has the right to direct plan account investments (e.g., upon the death of the participant) also is required to receive the disclosures.

PLAN-RELATED INFORMATION

The final regulation requires a plan administrator to provide the following plan-related information: general plan information, administrative expense information, individual expense information, and statements of actual charges and deductions. General plan information and information on administrative and individual expenses must be provided on or before the date that participants or beneficiaries first direct their investments, and, again, annually thereafter. Statements of actual charges and deductions must be provided at least quarterly, and may be included in quarterly benefit statements provided to participants and beneficiaries under Section 105 of ERISA.

General Plan Information

The rule requires plan administrators to provide general plan information

on plan structure and mechanics, such as the circumstances under which participants and beneficiaries can give investment instructions, restrictions on selecting or changing plan investments, a list of plan investment options, and "brokerage windows" or other default investment options.

Administrative Expense Information

Plan administrators must also provide an explanation of any fees and expenses for general administrative services that may be charged to, or deducted from, all individual accounts and that are not already included in the total operating expenses for any designated investment alternative. Examples include fees and expenses for plan accounting, and legal and recordkeeping services.

Individual Expense Information

Plan administrators must provide an explanation of fees and expenses that may be charged against an account of an individual (instead of on a plan-wide basis) based on action taken by that individual, such as plan loan fees, QDRO fees and charges for investment advice.

Statements of Actual Charges and Deductions

Participants and beneficiaries must receive statements showing the dollar amount of plan-related fees and expenses, whether they are "administrative" or "individual," that are actually charged to or deducted from an individual account, along with a description of the services for which the charge or deduction was made.

INVESTMENT-RELATED INFORMATION

Besides plan-related information, the final regulation requires a plan administrator to provide the following investment-related information: identifying investment option information, performance data and benchmark information, fee and expense information, and an internet Web site address and glossary. Investment-related information must be provided to participants and beneficiaries on or before the date they can direct their investments, and annually thereafter. The investment-related information must be provided in a chart or a similar format that will facilitate a comparison of each investment option available under a plan. The Department of Labor supplied a model chart, which can be found at www.dol.gov/ebsa/participantfeerulemodelchart.doc.

Identifying Investment Option Information

Names, investment categories (e.g., small-cap stock, money-market), and a Web site address where current investment information can be found must also be disclosed.

Performance Data & Benchmark Information

For each investment option that does not have a fixed rate of return, a plan administrator must provide average annual total returns for 1-, 5- and 10-year periods, as well as the name and returns of an appropriate securities index benchmark for the same time periods. The plan administrator must include a statement that past performance is not necessarily an indication of how the investment will perform in the future. For investments options that have a fixed or stated rate of return, the annual rate of return, any guaranteed minimum rate, and a statement that the rate of return may be prospectively adjusted must also be disclosed.

Fee & Expense Information

For each investment option that does not have a fixed rate of return, the total annual operating expense must be provided as both a percentage of assets and a dollar amount for each $1,000 invested. A plan administrator must also disclose other shareholder-type fees (fees charged directly to the participant's or beneficiary's account) such as sales charges, sales loads, redemption fees, deferred sales charges, surrender charges, exchange fees, account fees, and purchase fees. The disclosure must also include a statement that fees and expenses are only one aspect of participants and beneficiaries should consider when choosing an investment.

Internet Web Site & Glossary

A plan administrator must also provide participants and beneficiaries with the address of an internet Web site that is sufficiently specific to provide participants and beneficiaries with information about each investment option including its name, objectives or goals, principal strategies and risks, portfolio turnover rate, and performance data. Participants and beneficiaries must also be provided a general glossary of terms to assist in their understanding of the plan's investment options, or an internet Web site address that is sufficiently specific to provide such a glossary.

MISCELLANEOUS OBLIGATIONS

The rule states that plan administrators will be protected from liability for the completeness and accuracy of information provided to participants and beneficiaries if plan administrators reasonably and in good faith rely on information provided by service providers. After a participant or beneficiary has invested in an investment option, plan administrators must provide materials that the plan receives regarding voting, tender or similar rights in the investment option. In addition, upon request, plan administrators must provide prospectuses, financial reports, and statements of valuation and of assets held by an investment option.

DOL Proposes Rule Defining Investment Advisor "Fiduciary"

By Mark A. Amadeo, Esq.

The U.S. Department of Labor published a proposed rule on October 22, 2010, that broadens significantly the category of investment advisors who may be deemed "fiduciaries" under Section 3(21) of ERISA. The proposed rule replaces the explanation of "investment advice" in the current ERISA regulation, which was published in 1975. The Department of Labor will accept comments on its proposed regulation until January 20, 2011.

In a press release accompanying the proposed rule, the Department of Labor explained that the current 1975 regulation "may inappropriately limit the department's ability to protect plans, participants and beneficiaries from conflicts of interest that may arise from today's diverse and complex fee practices in the retirement plan services market." According to the Department of Labor, the proposed rule will "protect plan officials and participants who expect unbiased advice, by giving a broader and clearer understanding of when individuals providing such advice are subject to ERISA's fiduciary standards."

Old Test Under Prior Regulation

In 1975, the Department of Labor published a regulation setting forth a five-element test for determining when an advisor who does not have discretionary authority or control with respect to the purchase or sale of a security or property is a fiduciary. Under that test, each of the following five requirements was required to be met before an advisor could be deemed a fiduciary:

(1) The person renders advice as to the value of securities or other property, or makes recommendations as to the advisability of investing in, purchasing or selling securities or other property;

(2) The person renders such advice on a regular basis;

(3) The person renders such advice pursuant to a mutual agreement, arrangement or understanding, with the plan or plan fiduciary;

(4) The mutual agreement, arrangement or understanding is that the advice will serve as a primary basis for investment decisions with respect to plan assets; and

(5) The advice will be individualized based on the particular needs of the plan.

New Test

The proposed regulation replaces the five-element test with the following list of activities, any of which will confer fiduciary status to an advisor:

(1) Providing advice, appraisals or fairness opinions as to the value of investments, recommendations as to the buying, selling or holding of plan assets, or recommendations as to the management of securities or other property.

(2) Acknowledging fiduciary status with respect to advice or recommendations that are provided.

(3) Providing advice as an investment advisor under Section 202(a)(11) of the Investment Advisors Act of 1940.

(4) Providing advice or making recommendations pursuant to an agreement or understanding, whether written or not, with the plan or a plan fiduciary or a plan participant or beneficiary, where the advice will be individualized to the needs of the plan, fiduciary, participant or beneficiary.

Although the new proposed regulation includes some of the language found in the old test, the proposed regulation differs from the current regulation in several significant respects. First, the proposed regulation no longer requires that the advice be provided by the advisor on a regular basis. Thus advice offered only once may confer fiduciary status. Second, advice need not be offered under a mutual understanding that it will serve as the primary basis for investment decisions.

The proposed rule also makes clear that rendering advice for a fee includes fees received by an advisor or an affiliate of the advisor from any source, including transaction-based fees such as brokerage, mutual fund or insurance commissions.

Exceptions

The proposed rule indicates that the following conduct will not constitute rendering investment advice, and therefore, will not confer fiduciary status.

(1) Providing investment education information and materials.

(2) Marketing or making available investment options that plan sponsors, participants, or beneficiaries may choose from, as well as general financial information and data to assist a plan sponsor in the

selection of investment options, if the party offering the investment options and general information and data provides written disclosure that the party is not providing impartial investment advice.

(3) Making recommendations to a plan or participant as a security seller or purchaser whose interest is adverse to the plan or participant, as long as the recipient of the advice or recommendation knows or should know the seller or purchaser is not providing impartial investment advice (however, this exception would not include an advisor who has acknowledged fiduciary status).

(4) Preparing reports necessary to comply with ERISA, the Internal Revenue Code, or regulations thereunder.

A copy of the proposed regulation can be found at http://webapps.dol.gov/FederalRegister/PdfDisplay.aspx?DocId=24328.

Look For Upcoming Seminars

The breadth and pace of rules proposed or implemented over the last year that alter the health and pension benefits landscape has been breathtaking. To better assist clients and friends understand recent regulations promulgated by the Department of Labor and sister agencies over health benefits and defined contribution plans (such as 401(k) plans), the Amadeo Law Firm will begin offering seminars and presentations that discuss the impact of the regulations. As seminars are scheduled, the firm will notify newsletter recipients and will provide information on its Website.

If you are interested in learning more about upcoming seminars, please feel free to contact the Amadeo Law Firm or send an e-mail to newsletters@amadeolaw.com stating your interest in learning more about upcoming seminars.

ABOUT THE LAW FIRM:
The Amadeo Law Firm, PLLC, is a litigation and consultation boutique with offices in Frederick, MD & Washington, DC. The firm represents clients in commercial, employment, employee benefit, and government contracting matters.

The laws governing employee health and pension benefits are often complex and evolving. Employers, plan sponsors, and plan fiduciaries may need to seek consultation to ensure compliance with latest rules and applicable regulations.

The Employee Benefits Practice of the Amadeo Law Firm, PLLC, monitors employee benefit laws and regulations and provides sophisticated advice to employers, plan sponsors, and plan fiduciaries. The firm helps clients achieve workforce management goals related to providing employee benefits while also enabling them to devote their attentions to what matters most: their businesses.

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