

## Participant Fee Disclosures under §404(a)(5) – Round Two

**An employer who sponsors a qualified retirement plan that permits the participants to direct their own investments must provide the participants with an updated annual fee disclosure.**

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Under ERISA §404(a)(5), if an employer sponsors a qualified retirement plan in which the participants are permitted to direct some or all of the investments in their accounts, the Department of Labor (“DOL”) requires the employer to provide an annual disclosure to the participants detailing certain fee, expense, plan, and investment-related information. For most plans the initial disclosures were required to be provided to participants last year no later than August 30, 2012, with the regulations requiring a new disclosure to be provided annually thereafter. The final version of the regulations defines “annually” to mean at least once in any 12 month period.

The conservative interpretation of “at least once in any 12 month period”, and the interpretation that most experts are currently advising, is no later than 365 days from the date the disclosure was provided last year. For example, if the employer provided the initial disclosure on August 1, 2012, then the second disclosure should be provided no later than August 1, 2013.

Last year’s disclosure deadline of August 30, 2012 was determined by the DOL solely because that date tied in with the Service Provider fee disclosures that were due to plan sponsors by July 1, 2012. The DOL required that the first participant fee disclosures were to be provided to participants no later than 60 days after plan sponsors had received their service provider disclosures; therefore August 30, 2012 became the deadline date. Unfortunately, for most plans, August 30<sup>th</sup> has no relevance for any other notice or disclosure that must be provided during the plan year.

The American Society of Pension Professionals and Actuaries (ASPPA), and other advocates for plan sponsors and service providers, have requested additional guidance from the DOL regarding the timing of the annual participant fee disclosures and have made some suggestions for providing flexibility in the disclosure deadline from one plan year to the next. Having some flexibility as to when the disclosure must be provided may allow plan sponsors the ability to provide the fee disclosure at the same time that they provide other required notices and disclosures, thus easing the burden and expense of providing the various required notices.

It is not clear at this time, however, if the DOL will be receptive to any of the suggestions offered, or if the DOL will even address the issue before a plan’s 365 day deadline passes for providing the disclosure. For example, if an employer provided the disclosure on June 1, 2012, and takes a strict interpretation of the regulations, then barring any further guidance, the employer should be certain to have revised disclosures to the participants no later than June 1, 2013.

All affected employers, regardless of when they provided the initial disclosure last year, should begin now or in the very near future to begin the process of preparing the updated disclosure.

The first step in the process is to determine your deadline for providing this year’s fee disclosure. At least for now you may want to assume that deadline to be no later than 365 days from when the notice was provided last year.

The second step in the process is to contact the plan’s service providers, especially the plan’s recordkeeper or asset custodian and make certain you are aware of the level of assistance they will be providing in generating the disclosure. You should find out if the service provider will be providing you with a complete disclosure or if further editing is required. If the disclosure does not require editing, does it contain the fee information for all service providers, or just the fees of the recordkeeper? If your plan offers self-directed brokerage accounts you should be certain to contact the brokerage company regarding any assistance they may be providing in generating a disclosure.

We are always available to assist you as well. This year, as last year, we will be working with your other service providers, recordkeepers, financial advisors, to help you generate your fee disclosure. Please contact us soon to begin this process.