ASCi Alert

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Participant Fee Disclosure:

Are Your Clients (and You) Ready?

Fee Disclosure Series: Part 1 of 4

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We have all been inundated with information on fee disclosure over the last several years. To help you, the retirement plan professional, we have summarized the information (including deadlines) you need to know into a four-part series. This is the first ASCi Alert in the series, the 2nd will follow within a week and the third and fourth will be available later this summer.

The Department of Labor (DOL) has been on a mission to ensure fees associated with retirement plans are transparent and accessible to both plan fiduciaries and participants. The DOL has taken a three-prong approach to fee disclosure – disclosure to the government (i.e., Form 5500, Schedule C disclosures), disclosures to plan fiduciaries (i.e., the service provider fee disclosures under ERISA §408(b)(2)) and disclosures to plan participants (i.e., the participant fee disclosures under ERISA §404(a)).

The rules are now in place and responsible parties (generally plan sponsors, service providers and plan administrators) must take steps to comply with the requirements. Since most plan sponsors, administrators and fiduciaries rely on their third party administrators (TPAs) to assist them with compliance, TPAs must be the ones helping their clients gear up for compliance. With respect to participant fee disclosures, the DOL regulations make clear that the plan administrator, as defined under ERISA (generally the plan sponsor/employer), is responsible for complying with the disclosure rules. Still, plan administrators will expect their TPAs, and other service providers, to keep them apprised of their disclosure duties and required actions.

This ASCi Alert discusses the general requirements of the participant fee disclosure requirements, recent clarifications to the rules under DOL Field Assistance Bulletin (FAB) 2012-02 and steps to help ensure compliance. Separate ASCi Alerts will discuss the specific requirements for the annual and quarterly plan-related disclosures.

Compliance Date

After numerous delays in the participant disclosure rules, DOL will not provide additional delays. FAB 2012-02 makes clear that the compliance date for participant disclosures is tied to the service provider disclosure rule effective date (i.e., July 1, 2012). As such, for a calendar year plan, the deadline for the initial annual participant disclosure is August 30, 2012. (For non-calendar year plans, the deadline is the later of: (1) 60 days after the first day of the first plan year beginning on or after November 1, 2011, or (2) 60 days after the compliance date of the service provider disclosure rules (i.e., July 1, 2012)).

The deadline for the first quarterly participant disclosure for a calendar year plan is November 14, 2012. For a non-calendar year plan, the deadline is the later of November 14, 2012 and 45 days following the close of the first quarter in which the initial annual disclosures are required.

While FAB 2012-02 did not provide additional delays, it did indicate that plan administrators may rely on a good faith standard based on a reasonable interpretation of the rules.

ASCi Insight – With the announcement that DOL expects compliance by the appropriate deadline, we encourage all involved parties to provide disclosures on a timely basis. The DOL's good faith compliance standard provides some assurance that good faith efforts will not be punished. However, the DOL makes clear that it expects disclosures to be made by the appropriate deadline. We encourage all parties to provide timely disclosures even if such disclosures will need to be tweaked in the future as the regulatory requirements continue to be clarified.

Summary of Participant Disclosure Requirements

Basically, the intent of the participant disclosure regulations under ERISA 404(a) require that plan administrators of participant-directed defined contribution plans must disclosure certain information to plan participants and beneficiaries so that they are aware of their rights and responsibilities with respect to managing their individual plan accounts and are provided sufficient plan information, including its fees and expenses, to make informed decisions about the management of their individual accounts.

The required disclosures must include the following:

1. General plan-related information (at least annually);
2. General information about administrative expenses (at least annually);
3. General information about individual expenses that may be charged to participant accounts (at least annually);
4. Specific information about administrative expenses and individual expenses actually charged to the participant account (at least quarterly); and
5. Investment-related information (some mandatory and some upon request).

ASCi Insight – The plan administrator must provide the participant fee disclosure information not only to eligible plan participants, but also to beneficiaries of deceased participants and alternate payees under a QDRO who have account balances under the plan. Eligible plan participants include all eligible employees, whether or not they are deferring under a 401(k) plan.

Recent Clarifications

DOL FAB 2012-02 and recent DOL presentations provide some important clarifications to the participant fee disclosure requirements. FAB 2012-02 includes 38 questions and answers on common issues that have arisen since the issuance of the final regulations in October 2010.

ASCI Insight – The DOL is expected to issue similar guidance on the service provider disclosure requirements in the near future. Since the compliance date for those regulations is July 1, 2012, issuance at this time will not provide much help to service providers in complying with the disclosure requirements by this date. Still the guidance should be helpful. Hopefully, the DOL will announce in that guidance a similar "good faith" compliance standard as provided in the FAB 2012-02 for participant disclosures.

Here are some of the more important clarifications to the participant disclosure rules:

1. Covered plans – Under the regulations, the participant disclosure requirements apply to defined contribution plans that provide participant-directed investment. FAB 2012-02 clarifies that, if a plan has fiduciary-directed (e.g., trustee-directed) investments as well as participant-directed investments, the participant disclosure requirements apply only to the investment alternatives available to participant direction.

Also, with respect to 403(b) plans, the participant disclosure rules only apply to ERISA-covered 403(b) plans. Furthermore, the DOL will not enforce the disclosure rules on ERISA-covered 403(b) plans where the plan administrator reasonably determines that it is impractical or impossible to obtain information to provide investment-related information for certain annuity contracts issued before January 1, 2009.

ASCi Insight – The participant disclosure rules apply more broadly than the voluntary ERISA §404(c) disclosure requirements which have been in effect for some time. Any 401(k), profit sharing, money purchase or ERISA-covered 403(b) plan that provides participant direction of investments MUST comply with the new participant disclosure rules.

2. Plan-related and investment-related information – A plan administrator may use multiple documents to provide the required plan-related and investment-related disclosure information. A single document is not necessary. However, if a plan administrator provides the plan-related and investment-related information in a single document, there is no need to duplicate the information. If the plan administrator uses multiple documents for investment-related disclosures, participants must receive the documents at the same time.

ASCi Insight – While DOL guidance indicates that the plan's summary plan description (SPD) may be used to satisfy some of the fee disclosure requirements, we believe that the SPD is not necessarily the best method for distribution of the information. As you know, the SPD contains a significant amount of information. Since the disclosure rules mandate that fee information must be disclosed at least annually, use of the SPD for complete fee disclosure would require generation and dissemination of an entire SPD on an annual basis.

3. Administrative expenses – When the plan pays administrative expenses from participant accounts, the plan administrator must disclose the type of administrative service (e.g. recordkeeping), the cost of the service and the plan's allocation method (e.g., per capita or pro rata). FAB 2012-02 provides sample language where the administrative fees are not yet known, but can be reasonably anticipated. If the fees fluctuate from year to year, the disclosure may include a more general statement.

If the administrative fee is paid from participant accounts, but may be reduced by some revenue sharing agreement, the plan administrator still must disclose such an arrangement in the annual disclosure.

If the plan administrator has historically and exclusively paid administrative expenses from the plan's forfeiture account and general assets of the employer (i.e., expenses have not been charged to participant accounts), the plan sponsor need not disclose those fees to participants.

ASCi Insight – The ASCi pre-approved defined contribution plans include the following provision: "All reasonable expenses related to plan administration will be paid from Plan assets, except to the extent the expenses are paid (or reimbursed) by the Employer." Furthermore, the plans allow adopting employers to use forfeitures to first pay for administrative expenses. Plan sponsors must review the provisions of their plan documents as well as the historical payment of the administrative expenses to determine their disclosure requirements. If the plan sponsor intends to continue to pay all administrative expenses that are not reimbursed from the forfeiture account, the plan sponsor may wish to adopt written procedures indicating its intention.

4. Brokerage windows – Brokerage windows, self-directed brokerage accounts and similar arrangements are not considered designated investment alternatives. As a result, the plan administrator need not provide investment-related disclosures with respect to each investment available through the brokerage arrangement.

FAB 2012-12 clarifies that the plan administrator must provide information related to brokerage arrangements regarding how to give investment instructions, account balance and other restrictions and limitations, how the brokerage arrangement differs from the plan's designated investment alternatives and who to contact for more information.

ASCI Insight – The FAB 2012-02 question and answer relating to brokerage arrangements has created quite a stir in the retirement plan community. While explaining that brokerage arrangements are not designated investment alternatives, the FAB states that the failure to designate a manageable

number of investment alternatives raises possible fiduciary breach questions. Furthermore, the FAB indicates that plan administrators have an affirmative fiduciary responsibility to determine if an oft-chosen investment alternative under the brokerage arrangement raises it to the level of a designated investment alternative. This places a significant burden on the plan administrator to monitor participant investments under the brokerage arrangement and determine when it must be treated as a designated investment alternative (thus requiring full participant disclosures).

Steps for Compliance

FAB 2012-02 contains a number of additional clarifications. We encourage all involved parties (plan administrators, plan sponsors, services providers, etc.) to read the entire FAB as well as the regulations. The diversity of plan designs and investment alternatives create unique disclosure needs for any particular plan. No article or summary can properly explain all of the nuances of the rules. Each plan administrator and service provider must assess the specific disclosure requirements applicable to each plan. In any event, with the help of their service providers, plan administrators should take the following steps to ensure compliance with the regulations:

1. Determine whether a particular plan is a covered plan that must comply with the rules.
2. Determine who has responsibility for each aspect of the regulations. (As a service provider giving guidance, don't let anything fall through the cracks. Fingers get pointed very quickly when things go wrong.)
3. Based on plan design and investment alternatives, determine the applicable annual and quarterly disclosure needs and formats.
4. Give disclosure the best efforts, even if the disclosures may need to be tweaked in the future.
5. DO NOT MISS THE DEADLINES!! For calendar year plans, the deadlines are August 30 for annual disclosure and November 14 for the quarterly disclosure.