

UPDATE: Fee Disclosure Rules for Defined Contribution Plans: Deadlines Extended for Disclosures to Plan Participants & New Obligations on Plan Sponsors under Service Provider Regulations

At the end of 2011, we alerted you to final regulations (the "Final Regulations") by the U.S. Department of Labor ("DOL") that would apply as early as May 31, 2012 requiring plan administrators of participant-directed defined contribution retirement plans that are covered by the Employee Retirement Income Security Act ("ERISA") to disclose certain plan and investment-related information, including fee, expense and investment performance information, to participants and beneficiaries. (For background and more detailed information regarding the Final Regulations, see our previous Alert located at <http://www.pbwt.com/2012-new-disclosures-to-defined-contribution-plan-participants/>) The DOL has now taken action that extends the deadlines associated with the Final Regulations by three months. The impact of this extension on the specific notices under the Final Regulations are as follows:

- *First Initial Notices:* For calendar year plans and non-calendar year plans with a plan year beginning between November 1, 2011 and July 1, 2012, Initial Notices must be furnished by August 30, 2012 (instead of May 31, 2012 as reported in our initial Alert).

For plans with a 2012 plan year that begins after July 1, 2012 and before November 1, 2012, Initial Notices must be furnished within 60 days following the first day of the plan's 2012 plan year (for example, for a plan with a plan year that runs September 1 through August 31, the first Initial Notice under the Final Regulations will be due by October 31, 2012).

- *First Quarterly Disclosures.* Because the first quarterly disclosures are due 45 days after the end of the first quarter in which the first Initial Notices are due, for calendar year plans and most non-calendar year plans the first quarterly disclosure must generally be furnished by November 14, 2012 (instead of August 14, 2012 as reported in our initial Alert).

An updated table summarizing the timing rules for fee disclosures to plan participants is available on page three.

New Service Provider Fee Disclosure Regulations – Action Required by Plan Sponsors

The DOL has also recently published a second set of final regulations requiring *service providers* (e.g., investment advisors, recordkeepers, consultants, accountants, etc.) to most ERISA retirement plans to disclose their compensation and fees to *retirement plan fiduciaries* ("Service Provider Rules"). The Service Provider Rules, which will take effect on July 1, 2012 (under interim final regulations, services providers previously had to comply by April 1, 2012), require covered service providers to disclose certain information to plan fiduciaries about the services they will provide to the retirement plan and the compensation they will receive, including indirect compensation from sources other than the plan.¹ The DOL has said that the purpose of the disclosures is to enable plan fiduciaries to understand the services, assess the reasonableness of the compensation (direct and indirect) received by the service providers, and identify any conflicts of interest that may impact the service provider's performance. As we noted in our November 2011 Alert, plan administrators should expect new disclosures from service providers and possibly changes to current service contracts and arrangements as a result of the Service Provider Rules. Plan fiduciaries should review the disclosures and in light of their fiduciary

duties, should consider making changes to existing arrangements if they determine that fees being paid to and received by any service providers are too high.

Notably, if a service provider fails to provide the required information, the contract or arrangement between the retirement plan and the service provider is prohibited under applicable law, and the plan fiduciary will have engaged in a "prohibited transaction." However, the Service Provider Rules give relief to plan fiduciaries who enter into an arrangement for services with a reasonable belief that the service provider complies with the Service Provider Rules without knowing of the service provider's disclosure failures.² To qualify for the relief, the plan fiduciary must appropriately review the disclosures made by the service provider, and at a minimum compare the disclosures it receives from the service provider to the requirements of the Service Provider Rules to be able to form a reasonable belief that the required disclosures have been made. In addition, upon discovering that the service provider failed to disclose the required information, the plan fiduciary must request the missing information from the service provider in writing and, if the service provider does not provide the requested information within 90 days, the plan fiduciary must:

1. Determine whether to terminate or continue the contract or arrangement consistent with its duty of prudence. However, if the requested information relates to future services and is not disclosed promptly after the 90-day period, the plan fiduciary must terminate the service arrangement as quickly as possible; and
2. Notify the DOL within 30 days following the earlier of either the service provider's refusal to provide the requested information or 90 days after the plan fiduciary's written request was made. The DOL has published a model notice that can be used for this purpose, which is available at <http://www.dol.gov/ebsa/DelinquentService-ProviderDisclosureNotice.doc>. The DOL is also working on an on-line filing system for this notice.

Plan administrators will want to confer with their service providers as soon as possible to discuss compliance with the DOL's fee disclosure regulations. ♦

Endnotes

- ¹ The disclosures are not required with respect to fully vested annuity contracts and custodial accounts where no contributions have been made after 2008, and where all rights to benefits under the contract or account are enforceable by the plan participant without involvement by the employer.
- ² However, the relief under the Service Provider Rules does not necessarily relieve a plan administrator of the obligation to report a prohibited transaction. A separate analysis of reporting obligations should be undertaken.

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Summary: Timing Rules for Required Participant Fee Disclosures under the New Rules

Disclosure Deadlines	Type of Disclosure
First Disclosures Required in 2012	
August 30, 2012	First Initial Notices due for calendar year plans and for plans with non-calendar year plan years beginning between November 1, 2011 and July 1, 2012
60 days following the first day of the 2012 plan year	First Initial Notices due for non-calendar year plans whose 2012 plan year begins after July 1, 2012 and before November 1, 2012
November 14, 2012	First Quarterly Notices due for most plans whose plan year is a calendar year or begins between November 1, 2011 and July 1, 2012
45 days after the end of the first quarter in which the Initial Notices are required to be made	First Quarterly Notices due for plans whose 2012 plan year begins after July 1, 2012 and before November 1, 2012
Subsequent and Ongoing Disclosure Requirements	
On or before eligibility date to direct plan investments	Initial Notice (includes plan-related information and a comparative chart of investment-related information)
Every 12 months	Annual Notice (includes plan-related information and a comparative chart of investment-related information)
30 to 90 days before the effective date of any change to plan-related information provided in Initial Notice or Annual Notice	Updating Notice (includes plan-related information)
Every 3 months	Quarterly Notice (actual administrative and individual expenses charged to individual accounts)
Subsequent to investment	Certain investment information relating to voting and tender rights
Upon participant/beneficiary request	Certain investment information including prospectuses and financial statements