

# EMPLOYEE BENEFITS AND EXECUTIVE COMPENSATION ALERT

Alert

June 2012

## REMINDER: Upcoming Obligations On Retirement Plan Sponsors And Administrators Regarding Fee Disclosure

In continuing our series of Client Alerts pertaining to new requirements from the U.S. Department of Labor ("DOL") regarding retirement plan fee disclosures, we now remind you of obligations on most retirement plan sponsors and plan administrators that will become effective as early as July 1, 2012.

As we have previously alerted you, there are two sets of final regulations from the DOL in this area that will soon become effective—(1) so-called "Service Provider Fee Disclosure Regulations," which require certain service providers (e.g., investment advisors, recordkeepers and others<sup>1</sup>) to most retirement plans that are covered by the Employee Retirement Income Security Act ("ERISA") to disclose their compensation and fees to retirement plan fiduciaries, and (2) so-called "Participant Fee Disclosure Regulations," which require plan administrators of participant-directed investment defined contribution retirement plans that are covered by ERISA (e.g., most 401(k) plans and 403(b) plans) to disclose certain plan and investment-related information, including fee, expense and comparative investment performance information, to participants and beneficiaries. While it may be obvious that the Participant Fee Disclosure Regulations will require affirmative actions by plan administrators, it is important to note that the Service Provider Fee Disclosure Regulations also will require actions by responsible plan fiduciaries—i.e., those who have decision-making authority over the retirement plans.

### *Fiduciary Duties on Plan Sponsors Imposed by the Service Provider Fee Disclosure Regulations*

The Service Provider Fee Disclosure Regulations, which will take effect on **July 1, 2012**, require covered service providers to disclose certain information to ERISA retirement 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.<sup>2</sup> The DOL has said that the purpose of the disclosures is to enable responsible 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. Accordingly, responsible plan fiduciaries are obligated to review the disclosures and assess whether fees being charged to the plan are "reasonable." While the DOL has yet to provide meaningful practical guidance on what steps responsible plan fiduciaries must take to make a determination of whether such fees are reasonable, one way to satisfy this determination may be to compare the fees being charged with other alternatives and/or possible service providers. Responsible plan fiduciaries 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 responsible plan fiduciaries will have engaged in a "prohibited transaction." However, the Service Provider Fee Disclosure Regulations give relief from the requirement to treat the arrangement as a prohibited transaction to responsible

plan fiduciaries who enter into an arrangement for services with a reasonable belief that the service provider will comply with the Service Provider Fee Disclosure Regulations. To qualify for the relief, the responsible plan fiduciaries must:

- review the disclosures made by the service provider for any obvious errors or omissions so as to be able to form a reasonable belief that the required disclosures have been made; and
- upon discovering that the service provider failed to disclose the required information, request the missing information from the service provider in writing and, if the service provider does not provide the requested information within 90 days:
  1. Determine whether to terminate or continue the contractor arrangement consistent with the duty of prudence. However, if the requested information relates to future services and is not disclosed promptly after the 90-day period, the responsible plan fiduciaries 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 responsible plan fiduciaries' written request was made. The DOL has published a model notice that can be used for this purpose, which is available [here](#). The DOL is also working on an on-line filing system for this notice.

*Participant Fee Disclosure Regulations – More Guidance from the DOL*

In our prior Alerts, we gave detailed information about the substantive requirements on defined contribution plan administrators and the compliance deadlines under the Participant Fee Disclosure Regulations, which require action by most plan administrators by **August 30, 2012** (for plans with a 2012 plan year that begins after July 1, 2012 and before November 1, 2012, initial action will be required within 60 days following the first day of the plan's 2012 plan year). Please click [here](#) and [here](#) to read those prior Alerts. Since those Alerts, the DOL has published more guidance with respect to the Participant Fee Disclosure Regulations in the form of frequently asked questions contained within a Field Assistance Bulletin available [here](#), which provides some clarification and explanation about the Participant Fee Disclosure Regulations. Included within this additional guidance is confirmation that plan administrators can satisfy the comparative format requirement for investment-related information by combining in one mailing envelope (or other transmission medium) the comparative investment charts and other documents that it receives from each individual investment provider, but would not be in compliance with the requirement if it permitted the individual investment issuers (or other service providers) to separately distribute to plan participants comparative documents reflecting their particular investment alternatives. The new guidance also provides some surprising direction from the DOL about the fee disclosure required for brokerage windows, self-directed brokerage accounts and other similar plan arrangements that enable participants and beneficiaries to select investments beyond those designated by the retirement plan, where it was previously thought that many of the fee disclosure rules would not apply to these arrangements.

Further guidance from the DOL with respect to the DOL's fee disclosure rules is expected and will hopefully give practical solutions to some of the more onerous fee disclosure requirements on retirement plan sponsors and administrators, although such additional guidance is not likely in time for the July 1, 2012 effective date of the Service Provider Fee Disclosure Regulations. As such, pending that additional guidance, plan sponsors and administrators, as applicable, should be prepared to comply with the two sets of fee disclosure regulations based on current guidance. We are prepared to assist in understanding and complying with the requirements. Please contact one of the attorneys named below if you would like assistance.

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<sup>1</sup> Some service providers (e.g., actuaries, accountants, attorneys and consultants) are only covered by the Service Provider Fee Disclosure Regulations if they reasonably expect to receive indirect compensation (e.g., compensation received from a source other than the covered plan or plan sponsor).

<sup>2</sup> The DOL has indicated that it will generally not require disclosures with respect to fully vested annuity contracts and custodial accounts under 403(b) plans where no contributions have been made after 2008, and where all rights to benefits under the 403(b) plan contract or account are enforceable by the plan participant without involvement by the employer.

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## 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.<sup>1</sup> 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.<sup>2</sup> 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

<sup>1</sup> 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.

<sup>2</sup> 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
<b>First Disclosures Required in 2012</b>	
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
<b>Subsequent and Ongoing Disclosure Requirements</b>	
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

## Action Item for Defined Contribution Plans: New Disclosures to Participants Required in 2012

The U.S. Department of Labor ("DOL") has long been concerned about transparency regarding fees and expenses for participants in defined contribution retirement plans (e.g., 401(k) plans, 403(b) plans, profit sharing plans, money purchase plans) as part of its focus on ensuring that workers have access to the information they need to meaningfully compare the investment options under their employer-sponsored retirement plans and make informed decisions about how to manage and invest their retirement plan accounts. The DOL has made this concern one of its priorities over the last few years, culminating in final regulations (the "Final Regulations") 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. These new rules will generally apply as early as May 31, 2012.

Plan administrators of the impacted retirement plans and their service providers need to take prompt action to prepare for implementation of these new requirements, as they are tedious and detailed and will potentially require significant changes to current procedures and practices.

### General Requirements

The Final Regulations provide that when plan participants and beneficiaries are able to choose their investments (i.e., the plan is "participant-directed") in a defined contribution retirement plan, the plan administrator has a fiduciary duty to ensure that such participants and beneficiaries have sufficient information regarding the plan and the plan's investment options to make informed decisions about their investment choices. To that end, the Final Regulations provide for specific and detailed disclosure requirements that will require plan administrators of impacted defined contribution plans to assess their current disclosure practices and likely make changes to comply with the Final Regulations.

*Individuals Who Must Receive the Disclosures.* Notably, the indicated disclosures must be provided to each "participant and beneficiary" who, pursuant to the terms of the particular plan, has a right to direct the investment of his or her individual plan account. The DOL has clarified that this includes: (i) current and former participants who maintain plan accounts, (ii) employees who are eligible to participate in the plan but have not actually enrolled, and (iii) beneficiaries who have the right to direct the investment of their plan accounts (e.g., as a result of the death of a participant or pursuant to a qualified domestic relations order).

*Timing and Content Rules under the Final Regulations.* We provide below an outline of the required disclosures and their timing and content, cautioning that the new rules are long and detailed and this Alert only serves as a summary and not an exhaustive recitation of all the requirements of the Final Regulations. As a general matter, the information required to be provided under the Final Regulations is separated into two categories—*plan-related information* and *investment-related information*—which we describe more fully on the following pages.

1. *Initial & Annual Notice.* On or before the date that an individual can first direct investment of his or her plan account, and annually thereafter (i.e., once every 12 months), a notice must be given (referred to in this Alert

as the "Initial Notice" and the "Annual Notice"). The Initial Notice and the Annual Notice must contain the following information:

- a. *Plan-Related Information.* This category of information is further divided into three subcategories as follows:
  - i. *General Plan Information.* General plan information consists of information about the operation of the plan and the current investment options offered, such as an explanation of when and how to give investment instructions under the plan (and any plan limitations on such instructions, such as restrictions on transfers to or from an investment alternative), a description of any "brokerage windows" or similar arrangement that enables the selection of investments beyond those designated by the plan, reference to any applicable voting rights, and identification of any designated investment managers.
  - ii. *Administrative Expenses Information.* These are expenses related to plan administrative services (such as annual or monthly recordkeeping fees) that may be charged to the plan (and that are not included in the operating expenses of a particular investment options) and then allocated to participants' and beneficiaries' individual accounts. The basis on which such charges will be allocated to each individual account must also be disclosed (e.g., pro-rata or per capita).
  - iii. *Individual Expenses Information.* These are expenses that may be charged against a participant's or beneficiary's individual account for services provided on an individual basis (e.g., fees to process loans or qualified domestic relations orders (QDROs), or sales charges).
- b. *Investment-Related Information.* The required investment-related information is detailed and comprehensive and requires that investment alternatives be compared against each other. For each investment option available under the plan, the information required to be disclosed includes: performance data, benchmark information, fee and expense information, Internet website address to obtain more specific or current information, and a glossary of terms. The comparative format requirements for presenting the investment-related information is discussed in more detail below under the subheading "*Format and Distribution Methods for Fee Disclosure Notices.*"

For new participants and beneficiaries, the requirement to provide information on or before the date on which the participant or beneficiary can first direct investment of his or her plan account may be satisfied by furnishing to such individual the most recent Annual Notice furnished to participants and beneficiaries and, with respect to plan-related information, any subsequent Updating Notice (as defined below). The Final Regulations do not require that a plan administrator update materials in "real time" for each newly eligible employee.

2. *Updating Notice.* Any plan-related information previously disclosed in an Initial Notice or Annual Notice must be updated within at least 30 days but not more than 90 days prior to the effective date of the change (referred to herein as the "Updating Notice"). If a plan administrator is unable to provide such advance notice due to events that are unforeseeable or beyond the plan administrator's control, then the Updating Notice must be provided as soon as reasonably



practicable. Notably, the Final Regulations do not contain a "materiality" threshold for changes— as such, *any* change to the required plan-related information necessitates an Updating Notice. The updating requirements do not apply to investment-related information.

3. *Quarterly Notice.* At least once every three (3) months, participants and beneficiaries must receive statements showing the dollar amount of the plan-related fees and expenses (i.e., both administrative expenses and individual expenses) actually charged to or deducted from their individual accounts (referred to in this Alert as the "Quarterly Notice"). The statements must include a general description of the services that correspond to the expenses charged. The DOL has confirmed that no Quarterly Notice is required if there were no charges to a participant's or beneficiary's individual account in the preceding quarter (which should also mean that Quarterly Notices would not be required to be furnished to employees who are eligible to participate in the plan but have not actually enrolled). Furthermore, if a charge is otherwise disclosed during a particular quarter (for example, by a confirmation statement after a charge is deducted from an account), then the charge does not have to be disclosed again in a subsequent Quarterly Notice.
4. *Disclosures Subsequent to Investment.* In addition to the required investment-related information discussed above, the Final Regulations also provide for the disclosure to participants and beneficiaries after they have invested in a particular investment option of any materials that are provided to a 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 and beneficiaries under the terms of the plan.
5. *Information Provided Upon Request.* Upon the request of a participant or beneficiary, the following investment-related information must be provided: copies of prospectuses (or any short-form summary prospectus approved by the Securities Exchange Commission) or similar documents for non-registered investment alternatives; copies of any financial statements, reports and similar materials provided to the plan; statement of the value of a share or unit of each investment alternative and the valuation date; and a list of assets comprising the portfolio of each investment alternative that constitutes ERISA plan assets, and the value of each such asset (or its proportion of the investment which it comprises).

*Format and Distribution Methods for Fee Disclosure Notices.* The costs associated with implementing and delivering the Final Regulations' required disclosures can be of concern to plan administrators and employers. Some plan administrators are considering whether they can reduce the costs of complying with the Final Regulations by adding some of the Final Regulations' disclosures to other disclosures and/or notices that they are already providing under other legal rules. The Final Regulations affirmatively permit certain elements of the *plan-related information* (generally that required to be included in the Initial Notice and Annual Notice) to be provided as part of a summary plan description ("SPD") or periodic benefit statement required under the Pension Protection Act of 2006, provided that the SPD or benefit statement is furnished at a frequency that satisfies the timing rules required by the Final Regulations. The information required to be included in the Quarterly Notice may also be provided as part of a periodic benefit statement to the extent that the timing rules of the Final Regulations are satisfied.

The Final Regulations require that *investment-related information* be provided in a chart or other similar format that permits participants and beneficiaries to compare information. The Final Regulations include, as an appendix, a model comparative chart that may be used by a plan administrator to satisfy the Final Regulations' requirement that a plan's investment-related information be provided in a comparative format. While the model chart is not required to be used and plan administrators have flexibility to create their own formats, a plan administrator that accurately completes and distributes the model chart will be deemed to have satisfied the Final Regulations' disclosure requirements with respect to investment-related information. A copy of the DOL's model chart is attached to this Alert and can also be found at <http://www.dol.gov/ebsa/participantfeerulemodelchart.doc>. *Notably, the DOL has clarified that permitting each individual investment provider to separately distribute its own comparative chart to participants and beneficiaries would **not** satisfy the comparative format requirement.* However, the DOL has indicated that a plan administrator could satisfy the comparative format disclosure requirement by itself combining separate charts in one disclosure—for example, grouped by the type of investment (i.e., stock vs. bond funds) or by investment provider. Although not entirely clear, many in the field interpret the DOL's position as permitting a plan administrator to satisfy the comparative format requirement by combining in one mailing envelope (or other medium of distribution, as applicable), the separate comparative charts that it receives from each individual investment provider.

As another means of curtailing the costs and administrative aspects associated with complying with the Final Regulations, plan administrators and their service providers are considering electronic delivery methods of the required disclosures. Because the rules pertaining to electronic delivery, especially as they apply to disclosures under the Final Regulations, are detailed, somewhat cumbersome and currently in flux, plan administrators will want to proceed with caution if using electronic delivery as a means of satisfying disclosure obligations under the Final Regulations.

## **Obligation to Comply with Final Regulations is on Plan Administrator**

The Final Regulations provide that the compliance obligations rest with the plan administrator of an affected plan. Failure to comply with the Final Regulations' new disclosure requirements could give rise to remedies for breach of fiduciary duty.

Despite this implication of the plan administrator, the Final Regulations give plan administrators protection from liability for the completeness and accuracy of information provided to plan participants and beneficiaries if the plan administrator reasonably and in good faith relies upon information provided by a service provider (e.g., recordkeeper,) or investment provider. In order to meet their fiduciary obligations and the "reasonableness" standard described above, it is suggested that plan administrators periodically review the content and timeliness of information provided by third parties with respect to the Final Regulations.

## **Effective Date and Disclosures for 2012**

The Final Regulations technically apply for plan years beginning after November 1, 2011 (which means the 2012 plan year for calendar year plans). However, the DOL has provided delayed applicability dates to help plan administrators and their service providers transition into the new requirements.

### *First Initial Notices.*

- For calendar year plans and non-calendar year plans with a 2012 plan year beginning on or before April 1, 2012, individuals with existing rights to direct investments of their plan accounts

(including those who become eligible between now and the first disclosure date) generally must receive the Initial Notice by May 31, 2012.

- For plans with a 2012 plan year that begins after April 1, 2012, individuals with existing rights to direct investments of their plan accounts generally must receive the Initial Notice 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 July 1 through June 30, the first Initial Notice under the Final Regulations will be due by August 30, 2012).

*First Quarterly Disclosures.* The first Quarterly Notices will be due 45 days after the end of the first quarter in which the Initial Notices are required to be made. For calendar year plans and most non-calendar year plans with a 2012 plan year beginning on or before April 1, 2012, because the first Initial Notice generally must be furnished no later than May 31, 2012 (i.e., within the second quarter of calendar year plans), these plans must generally furnish their first quarterly disclosure by August 14, 2012.

*Initial Notices After the 2012 Transition Period.* After the 2012 transition period, plan administrators will be required to provide an Initial Notice to all newly eligible participants and beneficiaries on or before the date they can first direct their investments.

## **Relevance for Non-ERISA Plans**

While non-ERISA plans (e.g., church plans and governmental plans) are not subject to the Final Regulations, these plans may look to the new disclosure rules as "best practices" and modify their disclosure on a voluntary basis. Also, because service providers are likely altering their disclosures across-the-board to ensure compliance and consistency, they may not distinguish between ERISA and non-ERISA plans in this regard. As such, non-ERISA defined contribution plans may, by default, experience the effects of the Final Regulations.

## **Other Fee Disclosure Initiatives**

The Final Regulations are the third piece of the regulatory initiatives with respect to fee disclosure for employee benefit plans. In 2010, the DOL published interim final regulations requiring new rules for service providers (e.g., investment advisors, recordkeepers, consultants, accountants, etc.) to ERISA pension plans to disclose their compensation and fees to retirement plan fiduciaries of plans from which they expect to receive at least \$1,000 in compensation for the indicated services. The purpose of the service provider disclosures is to enable a plan fiduciary to determine if the arrangement with the service provider and the related compensation paid are reasonable and that any possible conflicts of interest are being appropriately addressed. The deadline for the first disclosures under those regulations is April 1, 2012. As a result, plan administrators should expect new disclosures from service providers and possibly changes to current service contracts and arrangements. Plan fiduciaries should be prepared to analyze enhanced disclosures to ensure that fees paid to service providers are reasonable and that potential or actual conflicts of interest are appropriately considered.

In addition, the DOL published new requirements with respect to Schedule C of Form 5500 which were generally effective for the 2009 plan year. These new Schedule C requirements will require administrators of large (i.e., with 100 or more participants as of the beginning of the plan year) ERISA employee benefit plans to provide more detail about fees and expenses from services providers to which they paid \$5,000 or more.

Congress has also tinkered in the defined contribution plan fee disclosure area, generally focusing on participant-level disclosures, though no legislative initiatives have yet to become law (notably, some legislative proposals are broader than the DOL's initiatives and contemplate applicability to non-ERISA plans as well).

## Action Steps for Plan Administrators

Although the Final Regulations will not technically apply for several months, their potentially onerous and burdensome requirements necessitate that plan administrators and their service providers act quickly to ensure that procedures will be in place to comply with the Final Regulations generally by May 31, 2012. We recommend the following actions for plan administrators and employers:

- *Identify all plans for which disclosures to participants under the Final Regulations must be provided.* Generally, all ERISA defined contribution retirement plans that permit participants and beneficiaries to direct investments will be impacted.
- *Review, contact and coordinate with service providers.* It is likely that service providers (especially recordkeepers, investment managers and investment providers) to defined contribution plans have already begun efforts to address the disclosures that will be required by the Final Regulations. It will be important for plan administrators to find out from service providers what types of disclosures are being contemplated and the timeline by which such disclosures will either be provided to plan administrators for them to distribute or directly provided to plan participants and beneficiaries. It will also be important to discuss the method of delivery.
- *Consider whether disclosures will be needed independent of those provided by service providers.* If the plan has multiple investment providers, it may fall on the plan administrator to compile and distribute relevant investment-related information in a comparative format, as the DOL has indicated that it is not sufficient for each investment provider to separately send the required investment-related information to participants and beneficiaries. Plan administrators will also want to balance the requirements of the Final Regulations with a concern about overloading participants and beneficiaries with too much information.
- *Review service provider agreements.* While we anticipate that much of the required information will come from service providers, assisting with the new disclosure requirements may not fall within the scope of existing service agreements. If plan administrators expect service providers to share in the responsibility for complying with the necessary disclosures, updates to service contracts and fees may be needed.
- *Review and possibly amend current plan documentation.* As discussed above, some of the disclosures required by the Final Regulations may be appropriately included in a plan's SPD or benefit statements. Plan administrators should consider whether the distribution timing of such current documents will satisfy the timing requirements of the Final Regulations. Also, plan and trust documents as well as internal delegations may need to be amended to clarify the roles of the plan administrator, staff, directors and service providers with respect to the new disclosure requirements.
- *Review the plan's investment line-up and service providers.* In the process of dealing with the Final Regulations' onerous requirements, it may become evident that some service providers are better equipped and experienced to assist plan administrators in grappling with the new

## ACTION ITEM FOR DEFINED CONTRIBUTION PLANS: NEW DISCLOSURES TO PARTICIPANTS REQUIRED IN 2012

disclosure requirements. Plan administrators and plan sponsors may also use this as an opportunity to reassess their plans' current investment options and balance the need to provide for diversification with the burdens of disclosing fees, expenses and other investment-related information for a large investment line-up.

- *Anticipate impact of new service provider fee disclosure rules.* As briefly discussed above, service providers will also have new fee disclosure rules to comply with by the Spring of 2012. Plan administrators should expect to receive new disclosures from service providers. Plan fiduciaries will want to use the enhanced service provider disclosures to ensure that fees paid to service providers are reasonable and that conflicts of interest are appropriately assessed. ♦

<b>Summary: Timing Rules for Required Fee Disclosures under the New Rules</b>	
<b>Disclosure Deadlines</b>	<b>Type of Disclosure</b>
<b>First Disclosures Required in 2012</b>	
May 31, 2012	First Initial Notices due for plans whose 2012 plan year is a calendar year or begins by April 1, 2012
60 days following the first day of the 2012 plan year	First Initial Notices due for plans whose 2012 plan year begins after April 1, 2012
August 14, 2012	First Quarterly Notices due for most plans whose 2012 plan year is a calendar year or begins by April 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 April 1, 2012
<b>Subsequent and Ongoing Disclosure Requirements</b>	
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

## Model Comparative Chart

### ABC Corporation 401k Retirement Plan

Investment Options – January 1, 20XX

This document includes important information to help you compare the investment options under your retirement plan. If you want additional information about your investment options, you can go to the specific Internet Web site address shown below or you can contact [insert name of plan administrator or designee] at [insert telephone number and address]. A free paper copy of the information available on the Web site[s] can be obtained by contacting [insert name of plan administrator or designee] at [insert telephone number].

### Document Summary

This document has 3 parts. Part I consists of performance information for plan investment options. This part shows you how well the investments have performed in the past. Part II shows you the fees and expenses you will pay if you invest in an option. Part III contains information about the annuity options under your retirement plan.

### Part I. Performance Information

**Table 1** focuses on the performance of investment options that do not have a fixed or stated rate of return. Table 1 shows how these options have performed over time and allows you to compare them with an appropriate benchmark for the same time periods. Past performance does not guarantee how the investment option will perform in the future. Your investment in these options could lose money. Information about an option's principal risks is available on the Web site[s].

<b>Table 1—Variable Return Investments</b>								
<b>Name/ Type of Option</b>	<b>Average Annual Total Return as of 12/31/XX</b>				<b>Benchmark</b>			
	1yr.	5yr.	10yr.	Since Inception	1yr.	5yr.	10yr.	Since Inception
<b>Equity Funds</b>								
A Index Fund/ S&P 500 www. website address	26.5%	.34%	-1.03%	9.25%	26.46%	.42%	-.95%	9.30%
					S&P 500			
B Fund/ Large Cap www. website address	27.6%	.99%	N/A	2.26%	27.80%	1.02%	N/A	2.77%
					US Prime Market 750 Index			
C Fund/ Int'l Stock www. website address	36.73%	5.26%	2.29%	9.37%	40.40%	5.40%	2.40%	12.09%
					MSCI EAFE			
D Fund/ Mid Cap www. website address	40.22%	2.28%	6.13%	3.29%	46.29%	2.40%	-.52%	4.16%
					Russell Midcap			
<b>Bond Funds</b>								
E Fund/ Bond Index www. website address	6.45%	4.43%	6.08%	7.08%	5.93%	4.97%	6.33%	7.01%
					Barclays Cap. Aggr. Bd.			
<b>Other</b>								
F Fund/ GICs	.72%	3.36%	3.11%	5.56%	1.8%	3.1%	3.3%	5.75%

www. website address					3-month US T-Bill Index
G Fund/ Stable Value www. website address	4.36%	4.64%	5.07%	3.75%	1.8% 3.1% 3.3% 4.99% 3-month US T-Bill Index
Generations 2020/ Lifecycle Fund www. website address	27.94%	N/A	N/A	2.45%	26.46% N/A N/A 3.09% S&P 500 23.95% N/A N/A 3.74% Generations 2020 Composite Index*

\*Generations 2020 composite index is a combination of a total market index and a US aggregate bond index proportional to the equity/bond allocation in the Generations 2020 Fund.

**Table 2** focuses on the performance of investment options that have a fixed or stated rate of return. Table 2 shows the annual rate of return of each such option, the term or length of time that you will earn this rate of return, and other information relevant to performance.

<b>Table 2—Fixed Return Investments</b>			
<b>Name/ Type of Option</b>	<b>Return</b>	<b>Term</b>	<b>Other</b>
H 200X/ GIC www. website address	4%	2 Yr.	The rate of return does not change during the stated term.
I LIBOR Plus/ Fixed- Type Investment Account www. website address	LIBOR +2%	Quarterly	The rate of return on 12/31/xx was 2.45%. This rate is fixed quarterly, but will never fall below a guaranteed minimum rate of 2%. Current rate of return information is available on the option's Web site or at 1-800-yyy-zzzz.
J Financial Services Co./ Fixed Account Investment www. website address	3.75%	6 Mos.	The rate of return on 12/31/xx was 3.75%. This rate of return is fixed for six months. Current rate of return information is available on the option's Web site or at 1-800-yyy-zzzz.

## Part II. Fee and Expense Information

**Table 3** shows fee and expense information for the investment options listed in Table 1 and Table 2. Table 3 shows the Total Annual Operating Expenses of the options in Table 1. Total Annual Operating Expenses are expenses that reduce the rate of return of the investment option. Table 3 also shows Shareholder-type Fees. These fees are in addition to Total Annual Operating Expenses.

<b>Table 3—Fees and Expenses</b>		
<b>Name / Type of Option</b>	<b>Total Annual Operating Expenses As a % Per \$1000</b>	<b>Shareholder-Type Fees</b>
<b>Equity Funds</b>		
A Index Fund/ S&P 500	0.18% \$1.80	\$20 annual service charge subtracted from investments held in this option if valued at less than \$10,000.
B Fund/	2.45% \$24.50	2.25% deferred sales charge subtracted from amounts

Large Cap		withdrawn within 12 months of purchase.
C Fund/ International Stock	0.79% \$7.90	5.75% sales charge subtracted from amounts invested.
D Fund/ Mid Cap ETF	0.20% \$2.00	4.25% sales charge subtracted from amounts withdrawn.
<b>Bond Funds</b>		
E Fund/ Bond Index	0.50% \$5.00	N/A
<b>Other</b>		
F Fund/ GICs	0.46% \$4.60	10% charge subtracted from amounts withdrawn within 18 months of initial investment.
G Fund/ Stable Value	0.65% \$6.50	Amounts withdrawn may not be transferred to a competing option for 90 days after withdrawal.
Generations 2020/ Lifecycle Fund	1.50% \$15.00	Excessive trading restricts additional purchases (other than contributions and loan repayments) for 85 days.
<b>Fixed Return Investments</b>		
H 200X / GIC	N/A	12% charge subtracted from amounts withdrawn before maturity.
I LIBOR Plus/ Fixed-Type Invest Account	N/A	5% contingent deferred sales charge subtracted from amounts withdrawn; charge reduced by 1% on 12-month anniversary of each investment.
J Financial Serv Co. / Fixed Account Investment	N/A	90 days of interest subtracted from amounts withdrawn before maturity.

The cumulative effect of fees and expenses can substantially reduce the growth of your retirement savings. Visit the Department of Labor's Web site for an example showing the long-term effect of fees and expenses at [http://www.dol.gov/ebsa/publications/401k\\_employee.html](http://www.dol.gov/ebsa/publications/401k_employee.html). Fees and expenses are only one of many factors to consider when you decide to invest in an option. You may also want to think about whether an investment in a particular option, along with your other investments, will help you achieve your financial goals.

### Part III. Annuity Information

**Table 4** focuses on the annuity options under the plan. Annuities are insurance contracts that allow you to receive a guaranteed stream of payments at regular intervals, usually beginning when you retire and lasting for your entire life. Annuities are issued by insurance companies. Guarantees of an insurance company are subject to its long-term financial strength and claims-paying ability.

<b>Table 4—Annuity Options</b>			
<b>Name</b>	<b>Objectives / Goals</b>	<b>Pricing Factors</b>	<b>Restrictions / Fees</b>
Lifetime Income Option  www. website address	To provide a guaranteed stream of income for your life, based on shares you acquire while you work. At age 65, you will receive monthly payments of \$10 for each share you own, for your life. For example, if you own 30 shares at	The cost of each share depends on your age and interest rates when you buy it. Ordinarily the closer you are to retirement, the more it will cost you to buy a share.  The cost includes a	Payment amounts are based on your life expectancy only and would be reduced if you choose a spousal joint and survivor benefit.  You will pay a 25% surrender charge for any amount you withdraw



	age 65, you will receive \$300 per month over your life.	guaranteed death benefit payable to a spouse or beneficiary if you die before payments begin. The death benefit is the total amount of your contributions, less any withdrawals.	before annuity payments begin.  If your income payments are less than \$50 per month, the option's issuer may combine payments and pay you less frequently, or return to you the larger of your net contributions or the cash-out value of your income shares.
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Generations 2020 Variable Annuity Option  www. website address	To provide a guaranteed stream of income for your life, or some other period of time, based on your account balance in the Generations 2020 Lifecycle Fund.  This option is available through a variable annuity contract that your plan has with ABC Insurance Company.	You have the right to elect fixed annuity payments in the form of a life annuity, a joint and survivor annuity, or a life annuity with a term certain, but the payment amounts will vary based on the benefit you choose. The cost of this right is included in the Total Annual Operating Expenses of the Generations 2020 Lifecycle Fund, listed in Table 3 above.  The cost also includes a guaranteed death benefit payable to a spouse or beneficiary if you die before payments begin. The death benefit is the greater of your account balance or contributions, less any withdrawals.	Maximum surrender charge of 8% of account balance.  Maximum transfer fee of \$30 for each transfer over 12 in a year.  Annual service charge of \$50 for account balances below \$100,000.
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**Please visit [www.ABCPlanglossary.com](http://www.ABCPlanglossary.com) for a glossary of investment terms relevant to the investment options under this plan. This glossary is intended to help you better understand your options.**

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If you would like more information about this alert, please contact one of the following attorneys or call your regular Patterson contact.

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