When Changes to 404a-5 Participant Fee Disclosure Data Requires Additional Participant Notifications

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If you are like most people out there, you hit your 404a-5 participant level fee disclosure ("Participant Fee Disclosure") saturation point about 12 months ago. The volume of articles and information about the still relatively new Department of Labor ("DOL") Participant Fee Disclosure requirements is staggering and, as a result, can be a bit intimidating. However, even if you are already on 404a-5 overload, the Participant Fee Disclosure requirements are now a permanent part of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), landscape. This means that plan sponsors of ERISA, participant directed, individual account retirement plans that pay plan expenses from plan assets and the service providers that work with those sponsors need to know these rules inside and out. Consequently, at the risk of being the wafer thin mint that just pushes you over the edge, the remainder of this article focuses on one easily missed but critical component of the Participant Fee Disclosure rules.

The aspect of the rules focused upon in this article is what to do if the information disclosed within the mandatory annual notice changes. If you haven't asked yourself this question yet, you should. Why? Because certain changes require not only the issuance of additional notifications but also that such notice be issued well in advance of the effective date of the change.

More specifically, if any of the Participant Fee Disclosure information set forth on the list below changes, each participant (which, don't forget 401(k) plan sponsors, is defined to include eligible employees who choose not to participate in the plan) and beneficiary must be furnished a description of such change at least 30 days, but not more than 90 days, in advance of the effective date of such change. An exception to the 30 day minimum advance notice requirement exists if "unforeseeable events" or "circumstances beyond the control of the plan administrator" result in the inability to provide such advance notice. In that case, the notice must be furnished as soon as reasonably practicable. However, it is expected that this exception to the rule will only apply very narrowly.

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The list of information which must be disclosed on the annual Participant Fee Disclosure notice and, if changed, requires additional advance notification is as follows. Drum roll please.

1. The circumstances under which participants and beneficiaries may give investment instructions;

2. Any specific limitations on such investment instructions under the terms of the plan, including any restrictions on transfer to or from a plan investment alternative selected by a plan fiduciary ("designated investment alternative");

3. A description of plan provisions relating to the exercise of voting, tender and similar rights appurtenant to an investment in a designated investment alternative as well as any restrictions on such rights;

4. The identification of any designated investment alternatives offered under the plan;

5. The identification of any fiduciary investment advisor with the authority to manage, acquire or dispose of plan assets ("designated investment manager");

6. A description of any "brokerage windows," "self-directed brokerage accounts" or similar plan arrangements that enable participants and beneficiaries to select investments beyond designated investment alternatives;

7. A description of any fees or expenses for general plan administrative services (e.g., legal, accounting, recordkeeping) which may be charged against the individual accounts of participants and beneficiaries and which are not reflected in the total annual operating expenses of any designated investment alternative, as well as the basis on which such charges will be allocated (e.g., pro-rata, per capita) to, or affect the balance of, each individual account; or

8. An explanation of any fees and expenses that may be charged against the individual account of a participant or beneficiary on an individual, rather than on a plan-wide, basis (e.g., fees attendant to processing plan loans or qualified domestic relations orders, fees for investment advice, fees for brokerage windows, commissions, front or back-end loads or sales charges, redemption fees, transfer fees and similar expenses, and optional rider charges in annuity contracts) and which are not reflected in the total annual operating expenses of any designated investment alternative.

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Fortunately, the DOL did recognize the burden associated with updating participants and beneficiaries on what could be extremely frequent fee and expense changes associated with individual designated investment alternatives. Therefore, as long as a website is maintained which gives participants and beneficiaries the opportunity to view current investment related fees and expenses associated with each designated investment alterative, it is generally permissible to update the information associated with those particular types of fees no more than once annually in conjunction with the issuance of the annual Participant Fee Disclosure notice. As a result, a change to something like a designated investment alternative's expense ratio would not require the issuance of a supplemental notice as is otherwise considered within this article.

So where does this leave us? What if a plan sponsor decides to change the plan's fund line-up? Does that require a 30 day minimum advance notice? Included on the list above is: the identification of any designated investment alternatives offered under the plan. A change to the fund line-up would involve a change to the designated investment alternatives offered under the plan. Therefore, it absolutely would require a 30 day advance notice!

How about a change in recordkeepers? Well the list above also includes general administrative expenses such as recordkeeping fees which are paid from participant accounts. Therefore, assuming that the recordkeeping fees are paid from plan assets, the answer again likely is yes!

The ERISA "Plan Administrator" (as opposed to the third-party retirement plan administrator) is ultimately responsible for ensuring that each participant and beneficiary receive the Participant Fee Disclosure notifications to which he or she is entitled. Therefore, the moral of this story is that ERISA Plan Administrators need to be certain that they understand and apply the Participant Fee Disclosure rules properly as a failure to do so is a breach of fiduciary duty in relation to which he or she could be individually liable. In addition, the DOL is already routinely requesting copies of fee disclosure notices in the context of its retirement plan enforcement efforts. Therefore, if you aren't certain how to comply with the Fee Disclosure Rules, seek professional assistance and be sure you get it right.

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