Arnall Golden Gregory LLP

Client Alert

Contact Attorney Regarding This Matter:

Edward A. Marshall
404.873.8536 – direct
edward.marshall@agg.com

Ready or Not? It's Time to Comply with the DOL's Participant-Disclosure Regulations

Over the past five years, fiduciaries overseeing 401(k) plans have faced an unwelcome barrage of litigation regarding the fees associated with plan investments and administration. Among other things, the plaintiffs' bar has targeted ERISA fiduciaries with lawsuits alleging that the fees paid to investment managers and service providers were "excessive," imprudently evaluated, and inadequately disclosed to plan participants. Given the sheer size of certain corporate plans, the liability exposure in class actions making such claims can be frightening, even when the per-participant "loss" flowing from an allegedly imprudent fiduciary decision is relatively miniscule.

Thankfully, smaller plans—such as those administered by most healthcare providers—have (to date) received scant attention from the plaintiffs' bar. That's the good news. The bad news, however, is that the same pressure to investigate and disclose fees associated with 401(k) plans is now coming to plan administrators in a different form—Department of Labor ("DOL") regulations codified at 29 C.F.R. § 2550.404a-5. And, for calendar year plans, the August 30, 2012 deadline for making annual disclosures is now upon us, and the November 14, 2012 deadline for making initial quarterly disclosures is just around the corner.

The DOL regulations, which went into effect for plan years beginning on or after November 1, 2011, require robust disclosures to plan participants and beneficiaries. The consequences for failure to comply are severe. First, in a virtually unprecedented move, the DOL has taken the position that an ERISA fiduciary who fails to comply with the regulations has committed a *per se* breach of his or her fiduciary duties. But it gets worse. While Section 404(c) of ERISA historically has provided fiduciaries with substantial "cover" in the event that a participant makes a bad investment decision in a self-directed retirement plan, failure to comply with the new regulations eliminates that defense—conceivably putting plan fiduciaries on the hook for the poor investment decisions of plan participants.

This article is designed to remind plan sponsors to pay careful attention to the deadlines for making these participant-level disclosures, and to provide a high-level overview of these new regulatory requirements.

Arnall Golden Gregory LLP
Attorneys at Law

171 17th Street NW
Suite 2100
Atlanta, GA 30363-1031

One Biscayne Tower
Suite 2690
2 South Biscayne Boulevard
Miami, FL 33131

2001 Pennsylvania Avenue NW
Suite 250
Washington DC 20006

www.agg.com

Category One: Plan-Related Information

The first category of disclosures that plan administrators will need to provide participants includes information about the general operation of the plan, expenses associated with the administration of the plan, and information about the expenses charged to individual participants' accounts. (To relate all this information, plan administrators should have already received detailed information from plan service providers.)

In broad strokes, plan administrators must provide participants with the following information:

- *General Information*. Starting with the most general body of disclosures, the DOL requires that plan administrators provide participants with information regarding their ability to give investment instructions; how those instructions are made and any restrictions thereon; how voting and tender rights may be exercised; a listing of designated investment options; the identity of designated investment managers; and a description of any brokerage windows available under the plan. Such information, moreover, must be provided annually, beginning on or before the date on which participants can first direct their investments.

- *Plan Administrative Expenses*. Next, plan administrators must provide participants with an explanation of fees and expenses associated with administrative services (such as accounting, legal, and recordkeeping services) that are charged to participant accounts, along with an explanation of *how* such fees and expenses are allocated. Like with the "general information" described above, these disclosures must be provided annually, beginning on or before the date on which participants can first direct their investments. In addition, participants must receive quarterly statements showing the actual amount charged to their accounts during the preceding quarter. These quarterly statements must be furnished within forty-five days after the end of the quarter in which the initial/annual disclosures are required to be provided to participants. While such statements need not specify the dollar figure that service providers received from designated investment options (such as 12b-1 fees or "revenue sharing"), the statement must at least indicate whether any such expenses were paid in the preceding quarter from one or more such options.

- *Individual Participant Expenses*. In addition to plan administrative expenses, plan administrators must inform participants about any fees or expenses assessed for services rendered on an individual-participant basis (such as loan fees, qualified domestic relation order ("QDRO") fees, and fees for investment advice). Like the "plan administrative expenses" disclosures, this information must be provided annually, beginning on or before the date on which participants can first direct their investments, along with a quarterly statement showing the actual amounts charged to an individual participant's account in the preceding quarter.

Category Two: Investment-Related Information

Apart from the plan-related information described above, the DOL also requires that plan administrators provide details regarding particular investment options being offered by the plan. Such information must be provided annually, beginning on or before the date on which participants can first direct their investments. In addition, investment-related information must be provided in a "comparative" format, such as a chart, so that participants can measure the various investment options side-by-side. (For a "model" chart, please click here.)

Among other things, the investment-related disclosures must include the following:

- The name and category of the relevant investment fund;
- A website where additional information may be found;
- For fixed return investments, the annual rate of return and term of the investment;
- For investments with a variable rate of return, one-, five-, and ten-year performance data (if available) and comparisons to an appropriate benchmark;
- A description of the fees charged directly to participant accounts;
- Restrictions on the ability to purchase, transfer, or withdraw from the investment option;
- The percentage expense-ratio associated with the investment option, along with an illustrative example showing how the total annual expense of the option would affect a $1,000 investment;
- A statement that fees and expenses are but one of several factors that a participant should consider when making investment decisions, along with a statement that fees and expenses can substantially reduce the growth of a retirement account; and
- A general glossary of terms (which can be provided via direction to a web address containing such information).

In summary, plan fiduciaries should **act now (if they have not already)** to ensure that they are prepared to meet the participant-disclosure requirements imposed by the DOL. While the task is herculean, the consequences of failure to comply can be catastrophic for fiduciaries, so time is clearly of the essence.