



**2012 Is Just Around the Corner:
Will You Be Ready for the New DOL Fee
Disclosure Rules?**

Presented By:
George L. Whitfield &
Justin W. Stemple

2012 Is Just Around the Corner: Will You Be Ready for the New DOL Fee Disclosure Rules?

**Slides 5 through 57 prepared by and
used with consent of:**

Ilene H. Ferenczy, Esq.
The Law Offices of Ilene H. Ferenczy, LLC

With edits by:
George L. Whitfield
Justin W. Stemple

Service Provider Disclosure

- **Background on Regulation**

- History

- Proposed December 2007
- Over 100 comments
- Hearing March 31 and April 1, 2008
- More comments
- Interim final July 16, 2010
- Final final July 19, 2011

- Effective Date

- Originally, July 16, 2011
- Notice of extension to January 1, 2012; NOW April 1, 2012

Service Provider Disclosure

- **Underlying Philosophy**

- Recent years: changes: how services provided and compensated; complexity; hard to know services and costs
- Fiduciary responsible for prudent selection of services and service providers
- Needs information about compensation and revenue sharing to enable informed decisions

One Thing to Note at the Outset

- If:
 - The service contract is with the plan sponsor, and not the plan; and
 - The service provider is paid only by the plan sponsor; and
 - The service provider gets no direct or indirect payments from the plan; and
 - The service provider really, really gets nothing from the plan;
 - No kidding; the plan pays the service provider nothing directly or indirectly...
- Then, the new DOL regulations do not apply to you at all

WHAT DO THE NEW REGULATIONS REQUIRE?

Fiduciary Obligations – Step 1

- Under ERISA, a fiduciary may not enter into a contract with a service provider unless:
 - The terms of the contract are reasonable
 - The compensation to be paid under the contract is reasonable
- Failure to meet these requirements could mean that entering into the contract was a fiduciary breach

Fiduciary Obligations – Step 2

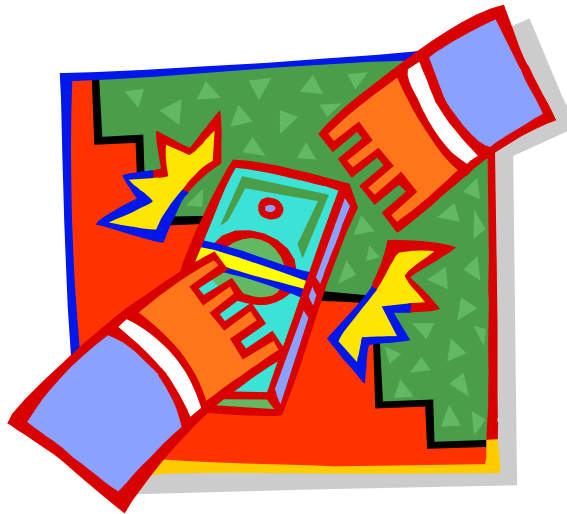
- Under ERISA, fees may be paid by a plan in exchange for services, so long as the services are necessary for the plan's administration and the fees are reasonable
- Paying unreasonable fees could be a breach of the fiduciary's ERISA duties

Fiduciary Obligations

- Therefore, if the fiduciary enters into a contract with unreasonably high compensation to a service provider or pays too much for services that are provided to the plan or for services that are not necessary, the fiduciary may be liable under ERISA

How to Fulfill These Duties

- A prudent fiduciary should know what the plan is paying for its services, and what it is getting in return for such fees



How to Fulfill These Duties

- Historically, fiduciaries often:
 - Could not get the information, even upon request
 - Were not sure whether they could rely on the information they got
 - Felt compelled to hire consultants to tell them what they were paying other consultants!

How to Fulfill These Duties

- The DOL wanted to establish a structure under which it could enforce the fiduciary obligations to review fees
- But how does the DOL, with jurisdiction generally over plans but not service providers, get the service providers to provide the needed data for the fiduciaries to review?

ERISA Relationships: Catch 22

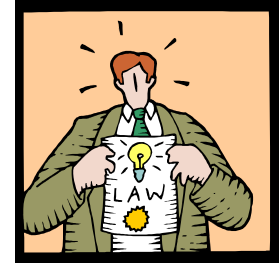


- Under ERISA, a service provider is a party-in-interest to the plan
- Because transactions between a service provider and a party-in-interest are generally prohibited, this status means that the plan cannot pay the service provider for his or her services

ERISA Relationships: PT Exemption

- There is a statutory exemption from the prohibited transaction rules (ERISA §408(b)(2)) that enables a party-in-interest service provider to get paid reasonable fees for necessary services
- It is this section that allows service providers to provide services and get paid by the plan

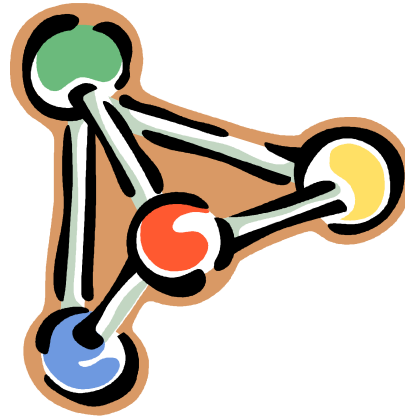
Enter the Regs!



- The DOL used the rules for the PTE as a means to force the service providers to cooperate with the fiduciaries as to fee analysis
- The new regulations require certain disclosures by the service provider to avoid having a prohibited transaction
- No disclosure = PT, with the service provider liable for excise taxes and other amounts

Enter the Regs!

- Effective for all contracts in existence as of April 1, 2012, and all future contracts
- For existing contracts, disclosures must be in place by April 1, 2012



STRUCTURE OF THE NEW REGS

What the Regulations Do

- Require certain *Disclosures*
- To Responsible Plan Fiduciary
- By *Covered Service Providers (CSPs)*
- Who receive *Direct* or *Indirect Compensation*
- In connection with *Services* provided to a *Covered Plan*

What the Regulations Do

- Note: if there is no transaction with the plan, there is no potential prohibited transaction, so these regulations do not apply
- Therefore: if the service provider is:
 - retained by the company, and
 - paid entirely by the companythese regulations do not apply to you

What Is a Covered Plan?

- The regulations currently apply only to ERISA-covered retirement plans, although they are expected to be expanded to apply to health and welfare plans in the future
- Regulations do not apply to:
 - SEPs
 - SIMPLE IRAs
 - IRAs



Who Is a CSP?



- The CSP is the one who enters into the contract or arrangement with the Responsible Plan Fiduciary (RPF) for the plan
- Must reasonably expect to receive \$1,000 or more in direct or indirect compensation
- Includes compensation received by an affiliate, or a subcontractor in connection with the provision of services by the CSP, an affiliate, or a subcontractor

Who Is a CSP?

- Note: if the CSP's services are all paid for by the employer, but the CSP, an affiliate of the CSP, or a subcontractor gets indirect compensation from the plan, that invokes these regulations
- You cannot avoid having to disclose fees simply by having another entity perform the services or get the compensation

Who Is an Affiliate?

- A person or entity who directly or indirectly controls, is controlled by, or is under common control with the CSP; or
- An officer, director, or employee of, or partner in, the CSP
- These rules apply even if the relationship is through one or more intermediaries

Who Is a Subcontractor?

- Any person or entity or affiliate of such person or entity that:
 - Is not an affiliate of the CSP; and
 - Pursuant to a contract or arrangement with the CSP or affiliate, reasonably expects to receive \$1,000 or more in compensation for performing services as provided for in the contract or arrangement between the CSP and the plan

CSP: What Kinds of Services?

1. Services provided as a fiduciary or registered investment advisor:
 - Provided directly to the plan by a fiduciary
 - Provided as a fiduciary to an investment contract, product, or entity that holds plan assets and in which the plan has a direct equity investment
 - Does not include the individual assets held by a mutual fund or other bundled investment product
 - Provided directly to the plan by an investment advisor registered under the Investment Advisors Act of 1940 or any State law

CSP: What Kinds of Services?

2. Recordkeeping or brokerage services:

- Provided to an individual account plan that permits participant direction of investments
- If one or more designated investment alternatives will be made available in connection with the recordkeeping or brokerage services
 - What does “in connection with” mean?
- Note: this does not apply to self-directed brokerage accounts, under which there are no “designated” investments

CSP: What Kinds of Services?

3. Other services for indirect compensation:

- Accounting
- Appraisal
- Custodial
- Legal
- TPA
- Auditing
- Banking
- Insurance
- Record-keeping
- Valuation
- Actuarial
- Consulting (limited)
- Investment Advisory
- Securities/Other Inv. Brokerage

For which the CSP, affiliate, or subcontractor reasonably expects to receive indirect compensation or certain compensation paid among the CSP, affiliate, or subcontractor

What Compensation Is Reportable?



- Disclosure requirements generally apply to direct or indirect “compensation”
- Anything of monetary value
 - E.g., money, gifts, awards, trips
- Only includes nonmonetary compensation if over \$250 during the term of the arrangement

Types of Compensation

1. Direct Compensation

- Received directly from the plan: aggregate (bundled) or by service; exceptions for recordkeeping

2. Indirect Compensation

- Received by CSP, affiliate, or subcontractor from a third party (i.e., not the plan, the plan sponsor, or each other)
- In connection with the services performed under the arrangement between the plan and the CSP

Manner of Disclosure

- You may disclose compensation information as:
 - Monetary amount
 - Formula
 - Percentage of plan assets
 - Per capita charge per participant
 - If none of these is possible, any reasonable method if it permits the evaluation of the reasonableness of the compensation

Manner of Disclosure

5. How each category of compensation is to be received
 - Billed to the plan
 - Deducted from investments
 - Other



THE REQUIRED DISCLOSURES

What Must Be Disclosed?

1. Initial Disclosures:

- a) Description of services to be provided
- b) A statement, if applicable, that the CSP, affiliate, or subcontractor (i.e., the “Provider”) will provide (or is expected to provide) services as a fiduciary
- c) A statement, if applicable, that the Provider will provide services directly to the plan as an investment advisor under the Investment Advisors Act of 1940 or any State law

What Must Be Disclosed?

1. Initial Disclosures (cont'd.):

- d) All direct compensation reasonably expected to be paid to any Provider
- e) All indirect compensation reasonably expected to be paid to any Provider; the service to which this compensation relates; and by whom the compensation will be paid

What Must Be Disclosed?

1. Initial Disclosures (cont'd.):

- f) Any compensation to be paid among the Providers set on a transaction basis or charged to the plan via the investment vehicle, the services to which this compensation relates, and who will pay and who will receive this compensation
- g) Any compensation that any Provider reasonably expects to receive in connection with the termination of the contract, and how prepaid amounts will be calculated and refunded on termination

What Must Be Disclosed?

2. With Regard to Recordkeeping Services:

- a) A description of all direct and indirect recordkeeping compensation that the Provider reasonably expects to receive
- b) If recordkeeping services are expected to be provided without explicit compensation, or if the compensation is offset or rebated based on other compensation received, a reasonable and good faith estimate and detailed explanation of the services to be provided (taking into account prevailing market rates for similar plans)

What Must Be Disclosed?

3. With Regard to Investment Disclosures in Relation to Fiduciary Services:

- a) Must provide the following for each contract, product, or entity that holds plan assets and in which the plan has a direct equity investment:
 - A description of any compensation charged directly against the amount invested in connection with the acquisition, sale, transfer of, or withdrawal from the investment contract, product, or entity ("vehicle")...

(see next slide for examples)

What Must Be Disclosed?

3. With Regard to Investment Disclosures in Relation to Fiduciary Services (cont'd):

Examples: sales loads or charges, deferred sales charges, redemption fees, surrender charges, exchange fees, account fees, purchase fees

- A description of the annual operating expenses (e.g., expense ratio), if the return is not fixed; and
- A description of any ongoing expenses in addition to annual operating expenses (e.g., wrap fees, mortality and expense fees)

What Must Be Disclosed?

4. With Regard to Investment Disclosures in Relation to Recordkeeping and Brokerage Services:
 - a) Everything required under #3 above in relation to any designated investment alternative (not plan assets) for which recordkeeping or brokerage services will be provided
 - b) May use disclosure materials from the issuer of the vehicle that includes the required information, if the issuer is not an affiliate, the disclosure is regulated by State or Federal agencies, and the CSP does not know the information to be inaccurate

What Must Be Disclosed?

CONFLICTS OF INTEREST

- Proposed regulations required CSP to provide narrative description of conflicts and potential conflicts of interest
- Dropped from interim final regulations in belief disclosures about indirect compensation and compensation among related parties will enable assessment of conflicts and potential conflicts

Reporting and Disclosure Information

- Fiduciary may request any other information necessary to comply with reporting and disclosure requirements of Title I
- Must be provided within 30 days following the request
- Exception: if extraordinary circumstances beyond the CSP's control preclude such disclosure
 - If so, must do ASAP



THE TIMING OF THE REQUIRED DISCLOSURES

Initial Disclosures

- “Reasonably in advance of the date the contract is entered into, extended, or renewed.”
 - The thrust is that the plan fiduciary should be determining whether the fees are reasonable as part of deciding whether to hire this provider to do the work
- New Effective Date: By April 1, 2012, for existing contracts

Initial Disclosures

- Exceptions:
 - If investment vehicle is not known to hold plan assets at the time the contract is entered into, must provide information not more than 30 days after the Provider knows that the vehicle holds plan assets;
 - If investment option is added as a designated investment alternative, must disclose ASAP after designation

Changes

- “As soon as practicable, but not later than 60 days from the date on which the CSP knows of the change.”
 - Exception:
 - If extraordinary circumstances beyond the CSP’s control preclude such disclosure
 - If so, must do ASAP



HOW TO DISCLOSE

Manner of Disclosure

- Must be written
- No prescribed format; no sample format
- Can come from different sources
- Engagement agreement/fee schedule is an excellent place to accomplish this

Specific Recommendations With Regard to §408(b)(2) Requirements

- A clear description of what you do:
 - Included in base fee
 - Separately charged (and fees for separate charges)
- Hourly rates of service providers, if applicable
- Fee arrangements that result in indirect compensation and what that compensation is for
- Estimated amount of indirect fees
- How you bill (at end or year, quarterly, progress)

Specific Recommendations With Regard to §408(b)(2) Requirements

- Whether indirect fees are in addition to fees charged or whether they will reduce fees charged
 - What happens if indirect fees to be offset actually exceed normal fees?
- Termination charges
- Detailed estimate of both direct and indirect fees (first year and ongoing)?

Specific Recommendations With Regard to §408(b)(2) Requirements

- Statement that determination of reasonableness of service provider fees (including yours) is the responsibility of the fiduciary



RAMIFICATIONS OF FAILURE TO DISCLOSE

No Disclosure

No Disclosure
=
No Reasonable
Contract

=

Prohibited
Transaction

Prohibited Transaction

- Party-in-interest (i.e., the service provider) subject to 15% excise tax on amount of fees
- Service provider (particularly if a fiduciary) *could* have to reverse the transaction, i.e., disgorge fees – downplayed in regulations and in DOL presentations, but not dismissed entirely, and acknowledged in some IRS presentations (and IRS enforces excise tax rules)

Disclosure Errors

- No PT deemed to occur if CSP acted in good faith and with reasonable diligence, but made an error or omission if:
 - CSP discloses correct information ASAP, but not more than 30 days from the date on which the CSP knows of the error

What About the Fiduciary?

- The Responsible Plan Fiduciary (RPF) has no liability for the disclosure failure if:
 1. The RPF did not know that the CSP failed or would fail to disclose and reasonably believed that the CSP did make proper disclosure;
 2. Upon discovering the failure, the RPF asked the CSP in writing for the information

What About the Fiduciary?

- The Responsible Plan Fiduciary (RPF) has no liability for the disclosure failure if (cont'd.):
 3. If the CSP fails to comply within 90 days, the RPF notifies the DOL of the CSP failure (info. needed for notification is in the regulations) within 30 days of the earlier of:
 - The CSP's refusal to furnish the information; or
 - 90 days after the written request is made

What About the Fiduciary?

- The Responsible Plan Fiduciary (RPF) has no liability for the disclosure failure if (cont'd.):
 4. The RPF determines whether to terminate the contract or arrangement, taking into account:
 - The nature of the failure;
 - The availability, qualifications, and cost of replacement CSPs; and
 - The CSP's response to the notification of the failure

What Must the Fiduciary Do?

- Review and analyze the disclosure
- Take appropriate actions

COMING SOON TO YOUR PLAN: DISCLOSURE TO PARTICIPANTS

Remaining Slides Prepared by:

George L. Whitfield

Mary Jo Larson

Lisa B. Zimmer



ERISA FIDUCIARY RULES

ERISA Fiduciary Rules

- Anyone who . . .
 - Has or exercises authority or control over management or disposition of the plan's assets
 - Renders investment advice for a fee
 - Has or exercises discretionary authority or responsibility over administration of the plan

ERISA Fiduciary Rules

- Who does this describe?
 - Who selects the plan's investment menu?
 - Who selects the plan's service providers?
 - Who approves the fees being charged to plan participants?

ERISA Fiduciary Rules

- Employer/Plan Sponsor meets 2 of 3 ERISA fiduciary definitions:
 - Exercises authority or control – disposition of the plan's assets
 - Discretionary authority or responsibility – administration of the plan

ERISA Fiduciary Rules

- Employer/plan sponsor always retains some fiduciary liability
 - Employer retains some discretionary authority or control managing the plan and its assets and administering the plan
 - Even if duties delegated, the employer always retains appointment and oversight responsibility
 - The employer is likely a named fiduciary under the plan; often is Plan Administrator

ERISA Fiduciary Rules

- A fiduciary must act:
 - Solely in the interest of plan participants and beneficiaries
 - For the exclusive purpose of providing benefits under the plan and paying reasonable expenses of administration
 - “With the care, skill, prudence and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims”
 - a/k/a the **prudent expert standard**: “The highest standard known to law.” As a prudent expert, with the care, skill, prudence and diligence of a person familiar with such matters .
..
 - In accordance with the plan and trust documents

ERISA Fiduciary Rules

- Procedural due process:
 - Follow the process very carefully
 - Document the analysis and decisions well
 - Spend as much time on it as necessary
 - Rely on "experts"

ERISA Fiduciary Rules

- Duties
 - Protect the plan participants
 - Protect and invest the plan assets
 - Diversify investments to reduce the risk of large losses
 - Carry out the purposes of the plan and the law
 - Avoid prohibited transactions
 - Based on the common law of trusts
 - Personal liability of individual fiduciaries

PARTICIPANT DISCLOSURES

Participant Disclosures

- **Background on final regulation**
 - History
 - RFI April, 2007
 - Proposed July, 2008
 - Suspended January 21, 2009; controversy; legislative proposals
 - Published October 20, 2010
 - **Applicability Date**
 - Plan years on/after November 1, 2011
 - **Underlying Philosophy**
 - DC plans with participant direction predominate
 - Participants with right to direct must have access to basic information

Participant Disclosures

- **Background on final regulation**
 - Third disclosure initiative
 - 404(a), not 404(c): mandatory duty to disclose
 - Impact on 404(c)
 - 404(c) is discretionary
 - Disclosure required under 404(c) now generally same as 404(a)
 - Must notify participants if 404(c)

Participant Disclosures

- Applies to ERISA participant-directed individual account plans
- E.g., 401(k), ERISA 403(b)
- Not government or non-electing church
- Not IRAs or IRA-based: SEPs; SIMPLEs
- Further guidance? Q&As?
- Further extension? Yes! See slide 75

Participant Disclosures

- **Who provides disclosure?**

- Plan Administrator
- Safe harbor: not liable for sufficiency and accuracy if:
 - Information from service provider or issuer of investment; and
 - Reasonable good faith reliance

- **Who receives disclosure?**

- All eligible participants whether or not actually enrolled
 - DOL believes annual notice serves as important reminder
- For former employees, death beneficiaries, and QDRO alternate payees, disclosure obligation only extends to those who have the right to direct the investments actually held in their accounts.

Participant Disclosures

- **Timing of disclosures**

- **Annual disclosures**

- On or before date participant can first direct investments
 - At least annually thereafter
 - At least once in any 12-month period, whether plan operates on calendar or fiscal year basis; choose timing, but no more than 12 months after last

- **Updates of annual disclosures**

- At least 30 days, but not more than 90 days, in advance of **any** change
 - If unable due to unforeseeable events or circumstances beyond the administrator's control, provide as soon as reasonably practicable

- **Quarterly disclosures**

- At least once in any 3-month period, whether plan operates on calendar or fiscal year basis; choose timing, but no more than 3 months after last

Participant Disclosures

- **Timing of initial disclosures (extended July 15, 2011)**
 - 60 days after applicability date, or if later, 60 days after April 1, 2012
 - Example
 - Calendar year plan applicability date = January 1, 2012
 - Due date for first annual disclosure = May 31, 2012
 - Initial quarterly disclosure: 45th day after end of calendar quarter in which initial disclosure was required (for calendar year plan: August 14, 2012)

Participant Disclosures

- **Required disclosures**
 - Plan-related information
 - General information about plan
 - Expenses
 - Administrative expenses
 - Individual expenses
 - Investment-related information
 - Electronic delivery: new temporary rules (DOL RFI)

Participant Disclosures

- **Plan-related information – general plan information**
 - List of investment options and designated investment managers
 - Circumstances under which may give investment instructions
 - Limitations on instructions (*e.g.*, transfer restrictions)
 - Explanation of voting, tender offer and similar rights
 - Description of brokerage windows or self-directed brokerage accounts
- **Method of disclosure**
 - Separate statement or electronic
 - SPD or benefits statement
- **Annual disclosure; update for changes**

Participant Disclosures

- **Plan-related information – expense information**

- Expenses paid directly by plan or participants
- Reduce participant account balances
- **Two types of plan expenses**
 - Administrative expenses
 - Fees for plan administration deducted from all accounts or paid through revenue sharing; *e.g.*, legal, accounting, recordkeeping
 - Does not include annual operating expenses of investment options; *e.g.*, does not include a mutual fund's management fees, expense loads or 12b-1 fees
 - Individual expenses
 - Fees charged against individual account (rather than plan as a whole); *e.g.*, fees for processing loans or QDROs, for investment advice, for brokerage windows, commissions, loads, redemption fees, transfer fees and optional annuity riders

Participant Disclosures

- **Plan-related information – expense information (cont'd)**
 - **Annual expense disclosure**
 - Administrative expenses
 - Explanation of administrative fees that may be paid by plan
 - How allocated (*e.g.*, pro-rata, per capita)
 - Individual expenses
 - Explanation of fees that may be charged against individual account
 - Method of disclosure
 - Separate statement or electronic
 - SPD or benefits statement

Participant Disclosures

- **Plan-related information – expense information (cont'd)**
 - **Quarterly expense disclosure**
 - Administrative expenses
 - Dollar amount actually charged to participant's account during preceding quarter and description of services to which charges relate
 - If applicable, an explanation that, in addition, some administrative expenses were paid from revenue sharing by one or more of the plan's designated investment alternatives (*e.g.*, revenue sharing, 12b-1 fees)

Participant Disclosures

- **Plan-related information – expense information (cont'd)**
 - **Quarterly expense disclosure (cont'd)**
 - Individual expenses
 - Dollar amount actually charged to participant's account during preceding quarter (or number of liquidated shares) and description of services to which charges relate
 - To extent already disclosed during quarter, for example a confirmation after charge is deducted from account, charge does not have to be disclosed on quarterly statement

Participant Disclosures

- **Plan-related information – expense information (cont'd)**
 - **Quarterly expense disclosure (cont'd)**
 - No quarterly statement required if no charges (administrative and/or individual) to participant's account during preceding quarter
 - Method of disclosure
 - Separate statement or electronic
 - Benefits statement

Participant Disclosures

- **Investment-related information**
 - On or before first investment and annually thereafter
 - After a new investment
 - Upon request

Participant Disclosures

- **Investment-related information – initial and annual notice**
 - **Format**
 - Investment alternatives must be presented in a chart or similar format for easy comparison
 - Model comparative chart provided in appendix to final regulation <http://www.wnj.com/files/upload/participantfeerulemodelchart.doc>
 - **Information provided**
 - Identifying information
 - Performance data/benchmarks
 - Fee information
 - Web site
 - Glossary
 - Certain mandatory statements
 - Special disclosures for annuity investments
 - Special rules for employer securities

Participant Disclosures

- **Investment-related information – initial and annual notice (cont'd)**
 - **Identifying information – each investment choice**
 - Name of investment alternative
 - Type/category; *e.g.*, money market, large-cap fund, balanced fund, employer stock fund, employer securities; use fund's description of itself
 - No need to specify passive or active management
 - Uncertainty concerning risk-based model portfolios

Participant Disclosures

- **Performance data**

- Fixed or stated return (*e.g.*, GIC, CD)
 - Annual rate of return and term of investment
 - If issuer reserves right to adjust rate prospectively, the current rate, the minimum rate, must include a warning that adjustments are possible and contact information (phone or web) to get most recent rate

Participant Disclosures

- **Performance data (cont'd)**
 - Other (*e.g.*, mutual funds, money market funds)
 - 1-, 5-, and 10-year average total returns (or life of investment, if shorter) ending on the most recently completed calendar year
 - Benchmark (name and returns of appropriate broad-based securities market index over 1-, 5-, and 10-year periods)
 - Benchmark should not be an affiliate of the investment provider, its investment advisor, or a principal underwriter, unless the index is widely recognized and used.

Participant Disclosures

- **Investment-related information – initial and annual notice (cont'd)**
 - **Fee and expense information**
 - Fixed or stated return investments
 - Amount and description of **shareholder-type** fees and restrictions on purchase/withdrawal
 - Investments w/o fixed return
 - Amount and description of **shareholder-type** fees and restrictions on purchase/withdrawal
 - Total annual operating expenses expressed as both % (*e.g.*, expense ratio) and \$ amount per \$1,000 invested

Participant Disclosures

- **Investment-related information – initial and annual notice (cont'd)**
 - **Fee and expense information**
 - Examples of **shareholder** fees
 - Commissions
 - Sales loads
 - Sales charges
 - Deferred sales charges
 - Redemption fees
 - Surrender charges
 - Exchange fees
 - Account fees
 - Purchase fees

Participant Disclosures

- **Investment-related information – initial and annual notice (cont'd)**
 - **Web site information**
 - Sufficiently specific to lead participant to the following information regarding the designated investment alternative
 - Name of investment's issuer
 - Investment's objectives
 - Investment's principal strategies (including general description of types of assets held)
 - Portfolio turnover rate
 - Performance data (updated at least quarterly)
 - Fee and expense information

Participant Disclosures

- **Investment-related information – initial and annual notice (cont'd)**
 - **Web site information (cont'd)**
 - Different requirements for fixed income and annuities
 - Web site address cannot be investment issuer's home page
 - What if the investment does not have a web site with required information?
 - Build it yourself (disclosure is plan administrator's duty)
 - Persuade issuer to develop site
 - Do not offer that investment
 - Real world: Issuer will maintain web site if it wants to continue to sell to retirement plans

Participant Disclosures

- **Investment-related information – initial and annual notice (cont'd)**
 - **Glossary**
 - Included on chart or chart must include web site address that provides access to glossary, along with explanation of purpose of address
 - Example
 - Please visit planglossary.com for a glossary of investment terms relevant to the investment options available under this plan. This glossary is intended to help you better understand your investment options.

Participant Disclosures

- **Investment-related information – initial and annual notice (cont'd)**
 - **Other required statements on chart**
 - Contact information for information available on request
 - Statements
 - More current investment-related information (*e.g.*, performance information) may be available at the listed web sites
 - Past performance not necessarily an indication of future performance
 - Fees and expenses only one of several factors to be considered when making investment decisions
 - Cumulative effect of fees and expenses can substantially reduce account growth; visit EBSA web site for an example
 - Can provide additional appropriate information if accurate and not misleading

Participant Disclosures

- **Requirements for target date or life-cycle funds (separate target date guidance)**
 - The asset allocation; how the allocation will change over time; the time when the allocation will be the most conservative (with a chart, table or other graph)
 - If specifies a date, explanation of applicable age group, relevance of date and any assumptions about contribution and withdrawal intentions on or after the date

Participant Disclosures

- **Target date or life-cycle funds (cont'd)**
 - A statement participant or beneficiary may lose money, including losses near or after retirement and that there is no guarantee of adequate retirement income
- Must be appendix or appendices to comparative disclosure chart

Participant Disclosures

- **Review DOL model comparative chart**
 - Separate document in program materials
 - Does not include target date information

Participant Disclosures

- **Investment-related information - other disclosures**
 - **Information provided after investment**
 - Materials related to voting rights to extent such rights are passed through to participant under plan's terms
 - **Information available upon request**
 - Prospectuses, short form prospectuses or equivalent for unregistered securities
 - Financial statements/reports (if provided to plan)
 - Statement of value per unit or share of each investment option
 - List of assets (portfolio) for each investment option which constitute plan assets under DOL regulations and value of each asset (or the proportion of the investment it comprises)

Participant Disclosures

- **Timing Summary**

- **Annual disclosure; change updates**

- Plan-related information including explanation of administrative and individual expense information
 - Investment-related information
 - New participants: most recent annual disclosure plus change updates

- **Quarterly disclosure**

- Dollar amounts of administrative and individual expenses charged to account during prior quarter

Participant Disclosures

- **Disclosure methods**
 - SPD or benefits statements
 - Separate statements
 - Electronic disclosure

Participant Disclosures

- **SPD or benefits statements**
 - SPDs not normally provided or updated as frequently as required for these disclosures
 - Benefits statements also may not be provided as frequently as necessary, especially for updates of annual information and for quarterly disclosures

Participant Disclosures

- **Electronic disclosures**
 - DOL guidance issued in 2002 and considered out of date and difficult to satisfy
 - After RFI, temporary transition rules issued September 13, 2011; may help
 - Generally must obtain consent to receive electronic notices, at least if no access to employer system
 - Must be advised of right to receive paper copies

Participant Disclosures

- **Electronic: New DOL Rules**
 - **Voluntary disclosure of email address**
 - **Special notices; also annually**
 - Voluntary
 - Description of information
 - Right to request paper copies
 - May stop electronic receipt
 - How to provide new address
 - **Efforts to assure actual receipt**
 - **Protect confidentiality**
 - **Understandable by average participant**

Participant Disclosures

- **Steps to take now**

- **Step one – commitments from providers**

- Inventory investment and affected service providers
 - Secure commitments to provide the required performance and fee information in a timely manner (including ability to satisfy web site requirements) and in a proper format
 - Obtain representations that information provided is true and complete; confirm necessary websites
 - Work with investment providers to determine appropriate benchmarks
 - Remember, plan fiduciaries protected from any incomplete and inaccurate information by reasonable good faith reliance on information received from service provider

Participant Disclosures

- **Steps to take now**

- **Step two – prepare and distribute information**

- Once receive information, determine how the information will be disclosed – separate statement, electronic, SPD, benefit statement, chart, etc.
 - Prepare disclosures
 - Calendar year plan: initial annual disclosure by May 31, 2012, and initial quarterly by August 14, 2012

- **Step three – other**

- Adequacy of missing participant procedures
 - Compliance with current electronic disclosure requirements
 - How handle participant questions?
 - Response to requests for additional information

Will You Be Ready for the New DOL Fee Disclosure Rules?

George L. Whitfield
gwhitfield@wnj.com
616-752-2102

Justin W. Stemple
jstemple@wnj.com
616-752-2375

