
401(k) Plan Transparency - Participant and Plan Fee Disclosures

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January 2012

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Participant-level Fee Disclosures

- Final Regulations – under ERISA section 404(a) – issued 10/20/10
 - Effective date – per guidance issued 7/19/11
 - Initial disclosure – later of:
 - 60 days after first day of first plan year beginning after 11/1/11 or
 - 60 days after effective date of plan-level fee disclosure final regulations (i.e., 4/1/12)
 - Quarterly disclosure – 45 days after end of quarter in which initial disclosures are required
 - Example – calendar year plans:
 - First comparative chart to be provided by 5/31/12
 - First quarterly disclosure to be provided by 8/14/12
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Participant-level Fee Disclosures

- What type of plan is subject to participant-level fee disclosures?
 - Any participant-directed individual account plan
 - As defined in ERISA section 3(34) – include 401(k) and 403(b) plans
 - Does not include:
 - IRAs
 - Simplified employee pension plans – Code section 408(k)
 - SIMPLE retirement accounts – Code section 408(p)
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Participant-level Fee Disclosures

- Who must provide participant-level fee disclosures?
 - Plan administrator
 - Or any person designated by plan administrator to act on its behalf
 - Plan administrator may rely on information received from plan service provider or issuer of a designated investment alternative
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Participant-level Fee Disclosures

- What is a designated investment alternative?
 - Any investment alternative designated by the plan into which participants and beneficiaries may direct the investment of assets held in their individual accounts
 - Does not include “brokerage windows”, “self-directed brokerage windows”, or similar arrangements that enable participants and beneficiaries to select investments beyond those designated by the plan
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Participant-level Fee Disclosures

- Who must receive participant-level fee disclosures?
 - All employees who are eligible to participate in plan
 - Including employees who have not actually enrolled in plan
 - All beneficiaries who have a right to direct investment of assets held in their account
 - Upon participant's death
 - Pursuant to a qualified domestic relations order
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Participant-level Fee Disclosures

- Plan-related information disclosure
 - Timing –
 - Initial disclosure - On or before date participant or beneficiary can first direct his or her investments and
 - Annually after initial disclosure
 - Quarterly statement is required to disclose dollar amount of fees and expenses actually charged to participant's or beneficiary's account during last quarter for administrative expenses and individual expenses
 - Notice of any change must be provided within 30 – 90 days in advance of effective date of change
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Participant-level Fee Disclosures

- Plan-related information disclosure
 - What must be disclosed – in general?
 - Circumstances under which participants and beneficiaries may give investment instructions
 - Explanation of any limitations on instructions – such as restrictions on transfer to or from a designated investment alternative
 - Description of plan provisions relating to exercise of voting, tender or similar rights (and restrictions on such rights) relating to a designated investment alternative
 - Identify designated investment alternatives under plan
 - Identify any designated investment manager under plan
 - Describe any “brokerage windows”, “self-directed brokerage accounts” or similar arrangements
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Participant-level Fee Disclosures

- Plan-related information disclosure
 - What must be disclosed – administrative expenses?
 - Explanation of any fees and expenses for general plan administrative services (such as, legal, accounting, recordkeeping)
 - Such fees may be charged against the individual accounts
 - Such fees are not reflected in the total annual operating expenses of any designated investment alternative
 - Include description as to how such fees will be allocated to individual accounts (such as, pro rata or per capita basis)
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Participant-level Fee Disclosures

- Plan-related information disclosure
 - Quarterly statement – administrative expenses – must include:
 - Dollar amount of fees and expenses actually charged to the individual account during the preceding quarter
 - Description of the services to which the charges relate (such as, legal, accounting, recordkeeping)
 - If applicable, an explanation that some of the plan's administrative expenses for the preceding quarter were paid from the total annual operating expenses of one or more of the designated investment alternatives (such as, through revenue sharing, 12b-1 fees, sub-transfer agent fees, etc.
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Participant-level Fee Disclosures

- Plan-related information disclosure
 - What must be disclosed – individual expenses?
 - Explanation of any fees and expenses that may be charged against an individual account on an individual (rather than plan-wide) basis and are not reflected in total annual operating expenses of any designated investment alternative
 - Such as, fees for processing plan loans or qualified domestic relations orders, investment advice or 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
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Participant-level Fee Disclosures

- Plan-related information disclosure
 - Quarterly statement – individual expenses – must include:
 - Dollar amount of fees and expenses actually charged to the individual account during the preceding quarter
 - Description of the services to which the charges relate (such as, loan processing fee, etc.)
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Participant-level Fee Disclosures

- Investment-related information disclosure
 - Timing –
 - Initial disclosure - On or before date participant or beneficiary can first direct his or her investments and
 - Annually after initial disclosure (referred to as “automatic” disclosure)
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Participant-level Fee Disclosures

- Investment-related information disclosure
 - Format of Disclosure –
 - Comparative format (see Model Comparative Chart – attached)
 - Must permit comparison of each designated investment alternative and must include:
 - Date of issuance
 - Plan administrator name, address and telephone
 - Statement that additional investment-related information (including more current performance information) is available at listed website address for each designated investment alternative
 - Statement explaining how to obtain, free of charge, paper copies of information available on web sites
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Participant-level Fee Disclosures

- Investment-related information disclosure
 - What must be disclosed – for each designated investment alternative?
 - Identifying information
 - Name and type of investment (such as, money market fund, balanced fund (stocks and bonds), large-cap stock fund, etc.)
 - Performance data
 - If variable return – average annual total return for 1, 5 and 10 calendar year periods ending on most recent prior calendar year and statement that past performance does not necessarily indicate future performance
 - If fixed return – fixed or stated annual rate of return and term of investment and, if applicable, statement that issuer reserves right to adjust rate of return prospectively and current rate of return, minimum rate guaranteed under contract and telephone number or web site to obtain most current rate of return
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Participant-level Fee Disclosures

- Investment-related information disclosure
 - What must be disclosed – for each designated investment alternative (continued)?
 - Benchmarks
 - If variable return – name and returns of appropriate brand-based securities market index over 1, 5 and 10 calendar year periods comparable to performance data periods
 - Index may not be of affiliate of designated investment alternative provider, unless index is widely recognized and used



Participant-level Fee Disclosures

- Investment-related information disclosure
 - What must be disclosed – for each designated investment alternative (continued)?
 - Fee and expense information – variable return investments
 - Amount and description of each shareholder-type fee (such as, commissions, sales loads, redemption fees, surrender charges, etc.) and any restriction on purchase, transfer or withdrawal
 - Total annual operating expenses of investment expressed as percentage
 - Total annual operating expenses of investment for one-year period expressed as dollar amount per \$1,000 investment
 - Statement that fees and expenses are only one of several factors to consider in making investment decision
 - Statement that cumulative fees and expenses can substantially reduce growth of retirement account and refer to EBSA website for examples
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Participant-level Fee Disclosures

- Investment-related information disclosure
 - What must be disclosed – for each designated investment alternative (continued)?
 - Fee and expense information – fixed return investments
 - Amount and description of each shareholder-type fee and any restriction on purchase, transfer or withdrawal
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Participant-level Fee Disclosures

- Investment-related information disclosure
 - What must be disclosed – for each designated investment alternative (continued)?
 - Web site address that provides following information regarding designated investment alternative:
 - Name of issuer
 - Objectives or goals per SEC Form N-1A or N-3
 - Principal strategies and risks per SEC Form N-1A or N-3
 - Portfolio turnover rate per SEC Form N-1A or N-3
 - Performance data updated at least quarterly
 - Fee and expense information
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Participant-level Fee Disclosures

- Investment-related information disclosure
 - What must be disclosed (continued)?
 - Glossary – definition of general terms to assist in understanding information regarding designated investment alternatives
 - Special rules for disclosures relating to:
 - Qualifying employer securities
 - Annuity options
 - Fixed return investments
 - Target date or similar funds
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Participant-level Fee Disclosures

- Investment-related information disclosure
 - Information to be provided subsequent to investment:
 - Materials related to exercise of voting, tender and similar rights to the extent such rights are passed through to participant or beneficiary under plan terms
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Participant-level Fee Disclosures

- Investment-related information disclosure
 - Information to be provided upon request related to a designated investment alternative – similar to ERISA section 404(c) rules:
 - Copies of prospectuses (or short-form or summary prospectuses approved by SEC)
 - Copies of financial statements or reports (such as shareholder reports)
 - A statement of the value of a share or unit of the designated investment alternative and the date of the valuation
 - A list of the assets comprising the portfolio of the designated investment alternative and the value of each asset
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Participant-level Fee Disclosures

- How are disclosures to be provided?
 - Investment-related information disclosures may be included in summary plan description
 - Plan-related information disclosures may be included in quarterly pension benefit statement
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Participant-level Fee Disclosures

- How are disclosures to be provided?
 - Electronic disclosure
 - Plan-related information disclosures may be provided electronically to employees who have access to a computer as part of work duties, as long as employees are sent e-mail advising of availability of disclosure and provided with option, upon request, to receive paper copy of disclosure; if employee does not normally have access to computer, affirmative consent to receive disclosure electronically must be obtained
 - Investment-related information disclosures may only be provided electronically after the employee voluntarily provides an e-mail address to receive disclosure in response to request included in initial paper notice
 - Paper request for e-mail address must be issued annually unless evidence employee interacted electronically with plan since prior annual notice
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Participant-level Fee Disclosures

■ Practical Issues

- Plan administrator obligations / fiduciary duties
 - Identify individuals to receive disclosures
 - Identify plan-related information and prepare annual and quarterly disclosures
 - Gather and present investment-related information in comparative format
 - Develop plan website with investment-related information
 - Consider summary plan description changes
 - Consider advance notice of plan changes
 - Determine method of issuing disclosures – including electronic delivery
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Participant-level Fee Disclosures

■ Practical Issues

- Coordination with ERISA section 404(c)
 - Application and disclosure voluntary
 - Certain provisions of participant-level fee disclosures incorporated
 - Additional guidance
 - Glossary – model
 - Electronic disclosure guidance
 - Target date funds
 - Explain asset allocation
 - Describe how asset allocation will change over time
 - Identify where investment reaches most conservative asset allocation
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Plan-level (Provider) Fee Disclosures

- Interim Final Regulations – under ERISA section 408(b)(2) – issued 7/16/10
 - Effective date – per guidance issued 7/19/11
 - April 1, 2012



Plan-level Fee Disclosures

- What type of plan is subject to plan-level fee disclosures?
 - Any employee pension benefit plan
 - As defined in ERISA section 3(2)(A) – including 401(k), 403(b), profit sharing, defined benefit, etc.
 - Does not include:
 - IRAs
 - Simplified employee pension plans – Code section 408(k)
 - SIMPLE retirement accounts – Code section 408(p)
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Plan-level Fee Disclosures

- Who must provide plan-level fee disclosures?
 - Covered service provider – defined as -
 - Service provider that contracts with plan and expects compensation of \$1,000 or more, direct or indirect, for providing one or more of following services:
 - Fiduciary or registered investment adviser
 - Recordkeeping or brokerage services for designated investment alternative available to participant-directed individual account plan
 - Services for which provider expects to receive indirect compensation from a source other than the plan, plan sponsor or covered service provider or affiliate or compensation paid among covered service provider and affiliate that is set on a transaction basis (i.e., commissions) or is charged directly against the plan's investment
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Plan-level Fee Disclosures

- Who must provide plan-level fee disclosures – (continued)?
 - Covered service provider – does not include:
 - Affiliate or subcontractor providing service to plan
 - Investment contract, product or entity in which plan invests
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Plan-level Fee Disclosures

- Who must receive plan-level fee disclosures?
 - A responsible plan fiduciary – a plan fiduciary with authority to cause the plan to enter into, renew or extend the contract or arrangement
 - In what form must the plan-level fee disclosure be provided?
 - The disclosure must be provided in writing
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Plan-level Fee Disclosures

- Timing –
 - Initial disclosure must be provided reasonably in advance of date contract is entered into, extended or renewed
 - Exceptions –
 - Investment contract subsequently holding plan assets – disclose within 30 days after assets are held
 - New designated investment alternative – disclose as soon as practicable
 - Change in information – disclose within 60 days after service provider is informed of change
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Plan-level Fee Disclosures

- What must be disclosed?
 - Services description
 - Status description – statement that services are provided directly to plan by service provider as a fiduciary or registered investment adviser
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Plan-level Fee Disclosures

- What must be disclosed?
 - Compensation description
 - Direct compensation – received from plan
 - Indirect compensation – received from source other than plan, plan sponsor or service provider or affiliate (include identification of services and payer)
 - Compensation paid among related parties – paid among covered service provider and affiliates (describe if set on transaction basis [i.e., commissions] or charged against plan's investment) (include identification of services, payer and recipients)
 - Compensation for termination of contract – describe compensation expected on contract termination and how prepaid amounts will be calculated and refunded
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Plan-level Fee Disclosures

- What must be disclosed?
 - Recordkeeping services
 - Description of compensation, direct and indirect, expected
 - If recordkeeping service cost is provided without charge or is offset against other compensation – a description of recordkeeping services provided and a reasonable, good faith estimate of cost of such services and an explanation of methodology used to obtain estimate
 - Manner of receipt of compensation – if billed or charged directly to plan accounts or investments
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Plan-level Fee Disclosures

- What must be disclosed?
 - Investment disclosure – fiduciary services (i.e., fiduciary or registered investment adviser) – a description for each investment contract of:
 - Compensation charged against investment for sale, transfer or withdrawal (i.e., sales loads, sales charges, redemption fees, surrender charges, account fees, etc.)
 - Annual operating expenses if return is not fixed
 - Ongoing expenses in addition to annual operating expenses (i.e., wrap fees, mortality and expense fees)
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Plan-level Fee Disclosures

- What must be disclosed?
 - Investment disclosure – recordkeeping and brokerage services for participant-directed individual account plans – a description for each designated investment alternative of:
 - Compensation charged against investment for sale, transfer or withdrawal (i.e., sales loads, sales charges, redemption fees, surrender charges, account fees, etc.)
 - Annual operating expenses if return is not fixed
 - Ongoing expenses in addition to annual operating expenses (i.e., wrap fees, mortality and expense fees)
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Plan-level Fee Disclosures

- Information to be provided upon request of plan fiduciary or plan administrator –
 - Any compensation information required for plan to comply with ERISA reporting and disclosure requirements
 - Covered service provider must disclose within 30 days following receipt of written request
 - Only exception is if disclosure is precluded due to extraordinary circumstances beyond service provider's control; then must provide as soon as practicable
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Plan-level Fee Disclosures

- Error by service provider – correction method:
 - If service provider makes an error or omission, when acting in good faith and with reasonable diligence, disclosure of corrected information must be provided to plan fiduciary within 30 days after service provider knows of error or omission
 - If such correction is timely made, contract will continue to be considered reasonable
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Plan-level Fee Disclosures

- Plan fiduciary's responsibility- if service provider fails to provide plan-level disclosures:
 - Request in writing that service provider provide disclosures
 - If disclosures are not provided within 90 days of written request, plan fiduciary must send written notice of service provider's failure to U.S. Department of Labor within 30 days after such date
 - Determine whether to terminate service contract
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Plan-level Fee Disclosures

- Practical Issues:
 - Development of industry standards for providing comparative information for designated investment alternatives
 - Service provider obligations / fiduciary duties
 - Unbundling of recordkeeping fees and estimate of cost
 - Written service agreement
 - Notification of potential conflict of interest
 - Coordination with Form 5500 – Schedule C fee disclosures
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Plan-level Fee Disclosures

- Expected guidance:
 - Final regulations – in clearance
 - To be coordinated with participant-level fee disclosures



Fiduciary Definition

- Proposed Regulations – under ERISA section 3(21) – issued 10/22/10
 - Withdrawn – 9/19/11



Fiduciary Definition

- Fiduciary – as originally proposed – was defined to include a person who provides investment advice for a fee, direct or indirect, to a plan if such person:
 - Provides advice, or an appraisal or fairness opinion, concerning the value of securities or other property
 - Makes recommendations as to advisability of investing in, purchasing, holding or selling securities or other property
 - Provides advice as to management of securities or other property
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Fiduciary Definition

- Fiduciary – as originally proposed – was defined to include a person who:
 - Acknowledges it is acting as a fiduciary in providing advice or making recommendations
 - Is a fiduciary under ERISA section 3(21)(A)
 - Is a registered investment adviser
 - Provides advice or makes recommendations regarding investment of plan assets on an individualized basis to plan, plan fiduciary, participant or beneficiary
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Fiduciary Definition

- Fiduciary – as originally proposed – excluded following acts from fiduciary definition:
 - If recipient should know that person is purchaser or seller of a security or other property and is not providing impartial advice
 - Provision of investment education and materials
 - Marketing platform for designating investments
 - Provision of general financial information to assist plan fiduciaries in monitoring plan investments
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Fiduciary Definition

- Practical Issues:
 - Distinction between general investment advice and targeted investment advice
 - Treatment of appraisals and valuations
- Expected guidance –
 - Reproposal of Proposed Regulations



Investment Advice

- Final Regulations – 10/25/11
 - Effective 12/24/11
 - Provides exemption to prohibited transaction rules for “eligible investment advice arrangements”



Investment Advice

- Eligible investment advice arrangements include:
 - Arrangements that use fee-leveling – any compensation received by the fiduciary directly or indirectly cannot vary based in whole or in part on the investment option selected by the plan participant
 - Arrangements that use computer modeling – computer models must utilize objective criteria to generate asset allocation portfolios made up of investment options offered under the plan, must avoid recommendations that inappropriately favor investment options provided by the fiduciary adviser and must avoid investment recommendations that inappropriately distinguish among investment options within a single asset class on the basis of a factor that cannot be expected to continue in the future
 - An eligible investment expert must certify in writing that the computer model meets the requirements of the final regulation
 - For both types of arrangements, an annual audit must be conducted to ensure compliance with the regulation; an audit report must be provided to the plan fiduciary within 60 days of the audit
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Questions and Comments

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