New Guidance on ERISA Participant-Level Fee Disclosures

On May 7, 2012, the Department of Labor released Employee Benefits Security Administration Field Assistance Bulletin 2012-2, which offers guidance in the form of "Frequently Asked Questions" on the fee disclosure rules for participant-directed individual account plans under section 404(a) of ERISA. The new guidance amplifies the requirements under these rules, which generally take effect August 30, 2012, and provides guidance coordinating these rules with the separate service-provider fee disclosure rules that generally take effect July 1, 2012. The DOL also stated in a press release that it is working on a second set of FAQs to address the service provider rules.

The participant-level fee disclosure rules apply to plan administrators of "covered individual account plans," including most participant-directed plans. The rules require plan administrators to provide disclosure on specified plan features, including administrative fees, and certain investment-related information, including descriptions of designated investment alternatives and current information on fees and expenses charged by those investment alternatives.

The new guidance, consisting of 38 FAQs, clarifies a number of points in the final regulations. Highlights include:

- *Frozen investment options.* The guidance clarifies that disclosures generally must be made even for designated investment alternatives that are closed to new investments.
- *Total annual operating expenses.* The guidance provides clarification on how to report total annual operating expenses for certain designated investment alternatives other than mutual funds – for example, unregistered funds, funds of funds, managed accounts that invest in mutual funds, and stable value funds.
- *Plan administrative expenses.* The guidance provides examples illustrating the level of detail that should be provided when disclosing fees and expenses for administrative services, and clarifies that if administrative expenses are not charged against a participant or beneficiary's account (e.g., if expenses are normally paid by the employer) they generally do not have to be disclosed.

FAB 2012-2 also states that if initial disclosures made when the rules take effect do not reflect the new information contained in this guidance, the DOL will, for enforcement purposes, take into account whether the plan administrator has made its disclosures in good faith based on a reasonable interpretation of the regulations and has established a plan for ensuring full compliance.

Ropes & Gray's earlier alert on the participant-level fee disclosure regulation is available here, and our alert describing the service-provider fee disclosure regulation is available here.

As a reminder, new electronic disclosure rules applicable to certain of these disclosures call for participants and beneficiaries to be sent an opt-out notice 30 to 90 days prior to the date of the initial disclosure. With disclosures for many plans being due by August 30, 2012, the period for providing notice is rapidly approaching. Our alert generally describing special rules for using electronic communications to provide certain disclosures may be found here.

Please contact any member of Ropes & Gray's Benefits Practice Group with any questions about the fee disclosure rules or the new guidance.