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ALERT | Employee Benefits

HINKLE LAW FIRM LLC

DOWNTOWN WICHITA
301 N. Main St., Suite 2000
Wichita , KS 67202-4820

EAST WICHITA
8621 E. 21st St. N., Suite 200
Wichita, KS 67206-2991

OVERLAND PARK
6800 College Blvd., Suite 600
Overland Park, KS 66210-1683

316.267.2000
hinklaw.com

New Participant Fee Disclosure Regulations: Major New Burden is Right Around the Corner

For the last four years, the Department of Labor ("DOL") has been ratcheting up the amount of information that must be disclosed regarding the administrative operations and expenses of qualified retirement plans. While the DOL's intentions may be noble – enhancing the transparency of the fees that such plans incur and the impact of those fees on participants' individual accounts – the burden and expense of complying with these new significant disclosure obligations is not to be minimized.

The new participant fee disclosure regulations will soon impose significant reporting requirements on every participant-directed individual account plan that is subject to ERISA. This includes 401(k) plans, 403(b) plans, and many profit sharing plans.

The regulations mandate that all participants be provided with annual and quarterly disclosures from the plan describing certain general plan information as well as the expenses that may be (or have been) charged to their accounts as part of plan administration costs, investment fees, and other individual expenses. Much, if not all, of this information will reside solely with the plan's service providers (e.g., recordkeeper, investment fund, etc.). However, the regulations place ultimate responsibility for the required disclosures on the plan administrator (which, in most cases, is the plan sponsor/employer). Meanwhile, the penalty for failing to comply with these new obligations is that the plan administrator will be deemed to be in breach of its fiduciary responsibilities. This can invite participant lawsuits, DOL enforcement actions, and a host of other unpleasantries.

The first required disclosures under the new regulations are currently slated to be distributed no later than August 30, 2012. Although it is possible that the DOL will extend the effective date, there is no guarantee that this is going to happen.

There is a significant amount of work that every plan administrator must do before the participant fee disclosure regulations kick in. Plan administrators will want to familiarize themselves with all of the new disclosure obligations and work closely with the plan's service providers to determine who will take responsibility for ensuring that the disclosure requirements are met. This should include a thorough review of the administrative services agreement that is currently in place with the service provider.

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It is a virtual certainty as well, that participants will have questions about the fees and expenses that are being charged to their individual accounts once this information is disclosed for the first time. Plan administrators who are prepared for these questions will save themselves time, money, and aggravation.

These requirements, and the plans they apply to, are explained in more detail in the accompanying Memorandum we have prepared. We strongly urge you to read this Memorandum by clicking here.

If you have any questions regarding the impact of participant fee disclosure regulations, please feel free to call Eric Namee, Brad Schlozman, or Steven Smith at 316.267.2000.

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LAW FIRM LLC
hinklaw.com

MEMORANDUM

New Obligations for Sponsors of Qualified Plans: Participant Fee Disclosures

April 3, 2012

For nearly four years, the U.S. Department of Labor ("DOL") has been in the midst of an effort to require greater transparency in the fees that are charged to both participants and sponsors of qualified retirement plans. This regulatory initiative has focused on three prongs: (1) enhanced disclosure of the administrative and investment-related fees that are charged to each participant's account; (2) heightened disclosure by the plan's service providers of the compensation that they receive from the plan; and (3) increased disclosure by the plan of the compensation it pays to the plan's service providers. The new regulations and guidance are often extremely complex and may result in an avalanche of time-consuming burdens for plan sponsors. But to be forewarned is to be forearmed.

Our focus in this Memorandum is on the participant fee disclosure regulations. One may legitimately question whether the new paperwork that soon will have to be provided to participants will prove to be of much value. Whether useful or not, however, the detailed fee disclosures are mandatory. Employers would be well advised to read this Memorandum carefully. While service providers may end up handling many of the disclosure obligations on behalf of the plans they serve, it is the employer (in its capacity as plan administrator) that is ultimately on the hook for ensuring compliance under the new regulations. Failure to understand and take seriously this responsibility could expose an employer to significant liability.

As the effective date of the participant fee disclosure regulations draws closer, we have begun to receive an increasing number of questions from our plan sponsor clients. We have attempted, in this Memorandum, to address many of the issues that employers/plan sponsors will confront as they seek to comply with the regulations. To make the Memorandum as easy to read as possible, we have chosen to use a "question and answer" format.

Q-1. ***What types of plans are covered by the participant fee disclosure regulations?***

A-1. The participant fee disclosure regulations apply only to participant-directed individual account plans that are subject to ERISA (i.e., plans in which participants direct how the funds in their individual accounts will be invested). These include most 401(k) plans, profit sharing plans, and non-governmental 403(b) plans. The regulations do not apply to individual retirement accounts (IRAs), simplified employee pension plans (SEPs), SIMPLE plans, or any other plan that is not subject to ERISA.

Downtown Wichita Office
301 North Main Street
Suite 2000
Wichita, KS 67202-4820
316.267.2000
Fax 316.264.1518

East Wichita Office
8621 East 21st Street North
Suite 200
Wichita, KS 67206-2991
316.267.2000
Fax 316.630.8375

Overland Park Office
6800 College Blvd.
Suite 600
Overland Park, KS 66211-1533
913.345.9205
Fax 913.345.4832

Q-2. ***What is the purpose behind the new participant fee disclosure regulations?***

A-2. According to the DOL, the purpose of the participant fee disclosure regulations is to ensure that participants are made aware of their rights and responsibilities regarding their plan investments on a regular and periodic basis. The disclosures required by the DOL are intended to provide participants with sufficient information regarding the plan as a whole and the various investment options available under the plan (especially information about fees and expenses), to allow participants to make informed decisions regarding the management of their individual plan accounts.

Q-3. ***Who is responsible for providing the participant fee disclosures?***

A-3. The plan administrator is responsible for ensuring compliance with the participant fee disclosure regulations. (The plan administrator is usually the employer sponsoring the plan, although a separate committee or individual is occasionally designated as the plan administrator.)

In practice, one or more of the plan's service providers will likely take the lead in providing the various required disclosures, but it is the plan administrator that shoulders the ultimate legal responsibility for compliance.

Q-4. ***What are the consequences if the plan administrator fails to comply with the participant fee disclosure regulations?***

A-4. If the required disclosures are not provided to participants, then the plan administrator may be considered to be in breach of its fiduciary duties. This could subject the plan administrator (which, as noted above, is often the employer) to expensive litigation and potential damages. Of course, a participant would still have to prove damages from the lack of disclosure. The expense and headaches from having to defend against a breach of fiduciary lawsuit, however, should not be minimized. Moreover, the DOL could undertake an enforcement action, another unpleasant scenario to be avoided whenever possible.

Fortunately, the regulations do provide a safe harbor for plan administrators in the event that the information disclosed to participants is inaccurate or incomplete. In such circumstances, the plan administrator will not be subject to liability for breach of fiduciary duty if it reasonably relied in good faith on the information that was received from, or provided by, a plan service provider or one of the designated investment funds under the plan.

It is very important, however, that all plan administrators carefully review their administrative services agreements with their service providers, including any recordkeepers, investment funds, and investment advisors. We have already seen a number of service providers attempting to deny responsibility for providing participants with the newly required fee disclosures and instead seeking to pass off this responsibility to the plan administrator. If your administrative services agreement contains this type of language, it is in your interest to try to renegotiate it as soon as possible lest you find yourself with difficult and expensive disclosure obligations that you may not be equipped to handle.

Q-5. ***What types of information must be provided to plan participants under the fee disclosure regulations?***

A-5. The participant fee disclosure regulations require the distribution of general plan-related information as well as information on the specific administrative and investment-related fees and expenses for which the participants may be charged (directly or indirectly). Some of this information will have to be provided on an annual basis, while other information will have to be provided on a quarterly basis.

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The chart at the end of this Memorandum summarizes the specific disclosures and the required timing of such disclosures. Broadly speaking, though, the disclosures break down as follows:

- Annual Disclosures. At least once during each 12-month period, the plan must disclose:

  (a) A list of the plan's various investment options and how participants can direct their investments under the plan;

  (b) The administrative expenses that may be charged to participants' accounts in order to fund the operation of the plan, and how such expenses will be allocated to each participant;

  (c) Any individual fees and expenses – such as loan fees, QDRO fees, investment fees/"load" expenses, etc. – that may be charged to an individual participant's account rather than divided among all participants on a plan-wide basis; and

  (d) Detailed information about the performance of each of the investment options under the plan. This information will have to be provided in a comparative chart that satisfies the format requirements of the new regulations.

- Quarterly Disclosures. In addition to the annual disclosures, each quarter, the plan must disclose:

  (a) The dollar amount that was actually charged to a participant's account for plan administrative expenses during the previous quarter; and

  (b) The dollar amount that was actually charged to a participant's account for individual fees and expenses during the previous quarter.

  These quarterly disclosures are in addition to, although may be combined with, the quarterly benefit statements that must be provided to participants. Of course, if no fees were charged to a participant's account during the quarter, he/she will not have to be provided a quarterly disclosure.

Q-6. ***Who must receive the fee disclosures from the Plan Administrator?***

A-6. The required disclosures must be made to all participants and beneficiaries who are eligible to direct the investments in their accounts under the plan. Depending on the terms of the plan, this likely would include former employees who remain participants in the plan, the beneficiaries of deceased participants, and alternate payees under a qualified domestic relations order (QDRO). Note that even if an individual has no funds in his/her plan account, the plan administrator still must provide him/her with the fee disclosures required by the regulations.

Q-7. ***When do the required disclosures have to be provided to new employees/new participants?***

A-7. New participants in a covered plan must be provided with their initial disclosures (i.e., the disclosures that normally would be required on an annual basis) no later than the date on which they are first eligible to direct their investments under the plan. Thereafter, they must receive the disclosures at the same time as all other participants.

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Q-8. ***What is the relationship of the new participant fee disclosure regulations to the "safe harbor" provisions of ERISA § 404(c)?***

A-8. Many participant-directed account plans are set up to comply with Section 404(c) of ERISA. Section 404(c) provides a set of guidelines which, if followed by the fiduciaries of a participant-directed defined contribution plan, effectively transfer much of the potential liability associated with the selection of investment alternatives offered by the plan from the plan fiduciary to the employee participants. Compliance with Section 404(c) is voluntary, and it is also very complex, including detailed disclosure rules.

With the adoption of the new participant fee disclosure regulations, the DOL has essentially rendered *mandatory* the previously *voluntary* disclosure elements of Section 404(c). Under the new regulations, *all* participant-directed account plans that are subject to ERISA must provide participants with the full complement of disclosures. As a result of these regulatory changes, to the extent a plan is not taking advantage of the fiduciary protections offered by Section 404(c), it may want to reevaluate that decision inasmuch as it will now effectively be in compliance with most of Section 404(c) by virtue of its compliance with the new participant fee disclosure regulations.

Q-9. ***Do the disclosure obligations apply to all investment options under the plan?***

A-9. The investment-related disclosures required by the new regulations apply to all "designated investment options" under the plan. A "designated investment option" could include mutual funds, exchange traded funds (ETFs), annuities, or other investments into which participants are able to direct the investment of their plan accounts. However, the term "designated investment option" does not include brokerage windows or other self-directed brokerage accounts that may be available under the plan. As a result, the disclosure obligations do not apply to brokerage windows or other self-directed brokerage accounts.

Q-10. ***In the ocean of new disclosure obligations under the participant fee disclosure regulations, do any previous disclosure requirements go away?***

A-10. Yes. There is one small oasis of relief in this sea of new disclosure obligations. Specifically, prospectuses for mutual funds will no longer have to be sent automatically to participants each time they make an initial investment in the fund. Under the new regulations, prospectuses need only be provided to participants upon request.

Q-11. ***Is the Plan Administrator required to provide a website that summarizes all of the designated investment alternatives under the plan?***

A-11. Yes. For most investment options under the plan, this requirement can be satisfied simply by linking to the applicable mutual fund's website. It is still a significant burden, though, for most plan administrators. Ideally, a plan's service providers will agree to take on this responsibility. But since the participant fee disclosure regulations technically assign this obligation to the plan administrator, it is imperative that plan administrators make sure their service providers will help fulfill this new regulatory obligation.

Q-12. ***Can the disclosures be provided to participants electronically?***

A-12. In general, the answer is yes. There are procedures in place, for example, that would allow the required disclosure to be sent via e-mail or to be posted to a continuous access website. But the rules for sending notices to participants via electronic means can be very tricky, and there are numerous procedural hurdles that must be overcome in order to be able to do so. It is important, therefore, that you consult with counsel before going down this path.

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*Q-13. **When do the participant fee disclosure regulations take effect?***

A-13. The regulations technically are already effective. The deadlines for distributing the required notices, however, begin later this year, as summarized in Q&A #s 7, 14 and 17. As these Q&As reflect, there are essentially four different types of notices:

- Initial Participant Fee Disclosures (i.e., the initial annual disclosures)
- Annual Participant Fee Disclosures
- Quarterly Participant Fee Disclosures
- Disclosures Preceding Any Changes to Plan-Related Information or Fees

*Q-14. **When must the initial participant fee disclosures be distributed to participants?***

A-14. The timing of the initial participant fee disclosures (which must include the information required in the *annual fee disclosures*) depends on whether the plan is a calendar year or fiscal year plan. The DOL requires that these initial disclosures must be distributed to plan participants by <u>the later of</u>: (a) 60 days after the first day of the first plan year beginning on or after November 1, 2011; or (b) 60 days after the compliance date of the new service provider fee disclosures (i.e., July 1, 2012). Reduced to understandable English, this means that the deadlines are as follows:

- <u>Calendar Year Plans</u>. Initial participant fee disclosures must be distributed by calendar year plans no later than August 30, 2012.
- <u>Fiscal Year Plans</u>. The deadline for fiscal year plans to distribute their initial participant fee disclosures depends on the first day of the plan's fiscal year:
  - If the first day of the plan year begins in any month other than August, September, or October, the deadline for distributing the disclosures is August 30, 2012.
  - If the first day of the plan year is *August 1*, the deadline for distributing the disclosures is September 30, 2012.
  - If the first day of the plan year is *September 1*, the deadline for distributing the disclosures is October 31, 2012.
  - If the first day of the plan year is *October 1*, the deadline for distributing the disclosures is November 30, 2012.

*Q-15. **When must the annual participant fee disclosures be distributed to participants?***

A-15. The DOL requires that, in addition to the initial participant fee disclosures discussed in Q&A #14 above, participants also must be provided with an annual participant fee disclosure at least once during any 12-month period. It does not matter whether the plan is a calendar year plan or a fiscal year plan. The plan administrator has broad discretion as to the timing of the annual disclosure. The only requirement is that no more than twelve months have passed since the last time an annual participant fee disclosure was provided to the participants.

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Q-16. ***When must the first quarterly participant fee disclosures be distributed to participants?***

A-16. The deadline for distributing the first quarterly participant fee disclosures is 45 days after the end of the first quarter in which the initial participant fee disclosures (see Q&A #14 above) must be furnished. Once again, this means that the disclosure deadline is dependent on whether your plan is a calendar year plan or a fiscal year plan, as summarized below:

- Calendar Year Plans. The first quarterly participant fee disclosures must be distributed by calendar year plans no later than November 14, 2012. (This quarterly statement must reflect the fees and expenses actually deducted from a participant's account during the July -September 2012 quarter.)

- Fiscal Year Plans. The deadline for fiscal year plans to distribute their first quarterly participant fee disclosures depends on the first day of the plan's fiscal year:

  - If the first day of the plan year begins in any month other than September or October, the deadline for distributing the first quarterly disclosures is November 14, 2012.

  - If the first day of the plan year is *September 1*, the deadline for distributing the first quarterly disclosures is February 14, 2013.

  - If the first day of the plan year is *October 1*, the deadline for distributing the first quarterly disclosures is February 14, 2013.

Q-17. ***If there are changes to the information that must be disclosed under the new regulations, when do such changes have to be disclosed to participants?***

A-17. Any changes to the required disclosures regarding plan-related information, administrative expense information, individual expense information, and/or available designated investment alternatives – no matter how minor – must be provided to participants at least 30, but no more than 90, days prior to the effective date of such change. (See chart attached to this Memorandum for a list of the specific disclosures.) The only exception to the advance notice requirement is if the change is due to some unforeseeable event or circumstances beyond the control of the plan administrator, in which case the change must be communicated as soon as possible. Please note that there is no "materiality" requirement. If there is a change in the required disclosures, it must be communicated to participants.

Q-18. ***What steps should plan administrators take now?***

A-18. Before the effective date of the new regulations, it is very important that all plan administrators contact their service providers (e.g., recordkeeper, investment fund, etc.) to determine if the service provider will be taking responsibility for distributing the required annual and quarterly disclosures and maintaining the required websites. As part of this task, plan administrators should also review their administrative services agreements with these service providers. It might also be prudent to have experienced benefits counsel review the agreements as well. An ounce of caution now could save many pounds of trouble down the road.

Hopefully, most service providers will agree to provide these disclosures as part of their basic services. Indeed, it is only the service providers who possess most of the information necessary to provide the requisite disclosures. Remember, though, that the new participant fee disclosure regulations put the ultimate responsibility for making all the various disclosures on the *plan administrator*. So if your service provider is unable or unwilling to take responsibility for these disclosures, it may be time to shop for a new service provider.

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If you have any questions regarding the impact of participant fee disclosure regulations, please feel free to call Eric Namee, Brad Schlozman, or Steven Smith at (316) 267-2000.

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I. INITIAL AND ANNUAL REQUIRED DISCLOSURES	
Plan-Related Information	
General Plan Information	• Identify designated investment alternatives offered by the plan and any designated investment managers. • Explain how participants may give investment directions any restrictions on directing investments. • Describe rights of participants to exercise voting rights in any designated investment alternatives. • Describe any brokerage windows available under the plan.
Administrative Expense Information	Describe all plan administration fees and expenses that may be charged against a participant's account and how such charges will be allocated among participants.
Individual Expense Information	Describe any individual fees and expenses that may be charged to an individual participant's account rather than divided among all participants on a plan-wide basis. Examples includes loan fees, QDRO fees, "load" expenses, etc.
Investment-Related Information	
Identity And Investment Category	Identity the name of each designated investment alternative and the type of investment it is (e.g., large cap stock fund, money market, etc.).
Historical Performance Data for Plan's Designated Investments	Provide the 1-, 5- and 10-year returns (or life of an investment option, if shorter) for each designated investment alternative.
Benchmarks	For investment options that do not have a fixed rate of return, compare the historical performance of the investment option against an appropriate broad-based securities market index over a 1-, 5- and 10-year period.
Fee And Expense Information For Variable And Fixed Return Investments	• For variable return options, provide the total annual operating expenses, expressed as both a percentage of assets and as a dollar amount for each $1,000 invested, and any shareholder-type fees or restrictions on participant's ability to purchase/withdraw from the option. • For investment options that have a fixed rate of return, include any shareholder-type fees or restrictions on the participant's ability to purchase or withdraw from the investment. • Include a statement that fees and expenses are only one of several factors to consider when investing and that the cumulative effect of fees and expenses may substantially reduce retirement account growth.
Internet Website Address	Provide an Internet website address that is sufficiently specific to provide quick access to a variety of specified information about the plan's investment options.
Glossary	Provide a glossary of financial terms to assist participants in understanding their investment options and the fees thereunder.
Annuity Options	Special rules apply to the required disclosures for annuity investments.

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II. QUARTERLY DISCLOSURES	
Administrative Expenses Information	Indicate the exact dollar amount that was charged to the participant's account for administrative services during the preceding quarter. This description must include the following information: • The services to which the charges relate (e.g., plan administration, record-keeping, accounting services, legal fees, etc.). • How the fees were charged (e.g., liquidating shares or deducting dollars). • If any of the plan's administrative expense are paid from revenue sharing, 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 plan's designated investment alternatives (e.g., via revenue sharing agreements, 12b-1 fees, or sub-transfer agent fees).
Individual Expenses Information	Indicate the exact dollar amount that was charged to the participant's account for individual expenses during the preceding quarter. This description must include the following information: • The services (e.g., loan processing fee, QDRO processing fee, etc.) to which the individual charges relate. • How the fees were charged (e.g., liquidating shares or deducting dollars).

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