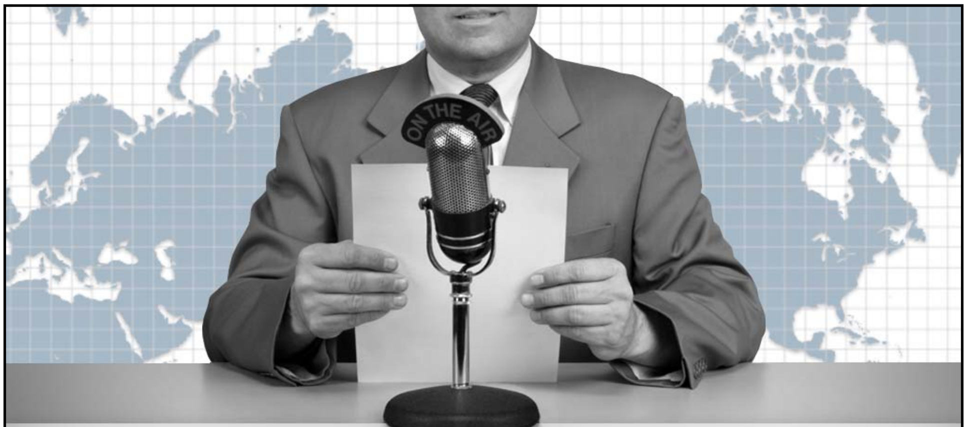

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Employee Benefits Broadcast

Today's Topics

- **Headline News:** Health Care Reform Legal Challenges and Delayed Effective Date for Insured Plan Nondiscrimination Rules
- **Cram Session:** Form 5500 Schedule C Reporting Requirements
- **Fiduciary Fundamentals:** Proposed New Definition of Fiduciary
- **In the Spotlight:** Plan and Service Provider Fee Disclosures – An Overview

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Headline News

Health Care Reform Legal Challenges and Delayed Effective Date for Insured Plan Nondiscrimination Rules

Belinda S. Morgan

Headline News

Background:

- Code §105(h) establishes criteria for determining whether plans discriminate in favor of "highly compensated individuals" (HCIs)
  - If a plan is discriminatory, "excess reimbursements" paid to HCIs are treated as taxable income
- Prior to enactment of PPACA, Code §105(h) applied only to self-funded medical plans

Headline News

- PPACA applies Code §105(h) to insured medical plans using "rules similar to" those applicable to self-funded plans
- Penalty for non-compliance is different:
  - A discriminatory insured plan is subject to civil action by non-HCIs to compel provision of nondiscriminatory benefits
  - Plan or plan sponsor could be subject to $100/day penalty for each person discriminated against by the discriminatory plan

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Headline News

- Notice 2011-1 delays PPACA's application of Code §105(h) to insured plans indefinitely - compliance with nondiscrimination rules is not required until further guidance is provided
  - No sanctions for failure to comply
  - Future guidance will apply prospectively
- Employers may submit comments on identified issues until March 11, 2011

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Headline News

Status of PPACA legislation:

- One of the most controversial components of PPACA is the so-called "individual mandate"
  - Requires nearly all Americans (with certain limited exceptions) to maintain a minimum level of health care insurance effective January 1, 2014
  - Penalties imposed on those who fail to obtain such coverage

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Headline News

- Individual mandate provisions of PPACA are already the subject of numerous lawsuits
  - Key argument is that individual mandate exceeds Congress' authority under Commerce Clause to regulate activities affecting interstate commerce
  - Not surprisingly, proponents and opponents of PPACA disagree on the likelihood of success of these cases

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Headline News

- Other main challenges include:
  – PPACA's revisions of Medicaid "coerce" and "commandeer" States' participation in a federal program in violation of the 10th Amendment and the Spending Clause
  – Penalty imposed on those who fail to purchase the required coverage is an unconstitutional tax
  – Various other claims

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Headline News

- So far, 4 district courts have ruled on the merits of the Commerce Clause claims
  – 2 courts (E.D. Mich., W.D. Va.) have rejected those claims, finding that failure to purchase coverage is not "inactivity" in the context of the Commerce Clause, insurance market
  – Economic activity subject to regulation by Commerce Clause need not involve transaction of business in the marketplace

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Headline News

- 2 courts (E.D. Va., N.D. Fla.) have found the individual mandate unconstitutional
  - Court of N. D. Fla. struck down the entire Act
    - "too many moving parts in" PPACA for individual mandate alone to be severed
    - Court declined to enjoin implementation of PPACA pending appeals, but admonished federal government to treat ruling as such
  - E.D. Va. Court severed the individual mandate from PPACA

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Headline News

- In addition, VA AG has filed a motion of petition for review of the E.D. Va. case with the U.S. Supreme Court
  - Argues that because of uncertainty caused by opposing rulings of various district courts, it is important to resolve the issue as quickly as possible
- Experts believe it is unlikely that the Supreme Court will take the case before it goes through the appellate appeal process

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Headline News

- Until these issues are resolved, and despite decision of N.D. Fla. court, the White House believes that PPACA implementation should continue
- Although one district court found all of PPACA to be unconstitutional, it is unclear whether other courts will follow the N.D. Fla. court's lead
- Employers/plans sponsors should keep this in mind when implementing other provisions of PPACA

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Cram Session

Form 5500 Schedule C Reporting Requirements

Katherine L. Aizawa

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Cram Session

Schedule C – Service Provider Information

- **What** Report service provider fees and other compensation of $5000 or more
- **Why** To help sponsors better fulfill fiduciary duty to assure plan expenses are reasonable for services provided. Addresses sophistication of market place.
- **Who** Large pension or welfare benefit plans (>100 participants)
- **When** 2010 Form 5500. In 2009 DOL excused sponsors if providers made good faith effort to revise systems but was unable to provide information

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Cram Session

Definitions

- **Reportable Compensation** means money or anything of value (e.g., gifts, awards, trips) received directly or indirectly from the plan because of services rendered to the plan

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Definitions – Cont'd

- **Direct Compensation** fees paid for with plan assets. Examples
  - Fees paid by the sponsor which are reimbursed by the trust
  - Administration and loan fees charged to participant accounts
  - Charges to trust account before allocations are made to participants

Definitions – Cont'd

- **Indirect Compensation** means amounts paid to a provider from a source other than the plan trust if the payment is because of services rendered to the plan or because of the person's position with the plan. Examples:
  - Management fees paid by a mutual fund to its investment adviser
  - Plan administration fees, e.g., Form 5500, record keeping services
  - Float revenue
  - Brokerage commissions
  - 12b-1 fees

Cram Session

Definitions – Cont'd

- **Eligible Indirect Compensation** means (i) certain types of fees or expense reimbursements that directly reduce investment returns and (ii) provider issues written disclosure to plan sponsor
- Types: finder's fees, float revenue, brokerage commissions, and soft dollar revenue
- Written disclosure requirements
  - Existence of indirect compensation
  - Services provided or purpose of payment of indirect compensation
  - Amount or estimate of compensation, or a formula used to calculate amount
  - Identity of parties paying and receiving compensation
- Written disclosure can be done electronically
- Deadline: not specified but disclosure must be provided in time to allow sponsor to timely file Form 5500

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Cram Session

Alternative Reporting Option for Eligible Indirect Compensation

- Advantage: Can provide only name and EIN or address of providers who receive Eligible Indirect Compensation

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Examples of Expenses that Do Not Have to Be Reported

- Schedule A compensation
- Investment fund's ordinary operating expenses, e.g., fees for attorneys, accountants, printers to the fund
- Payments not paid from the plan trust, i.e., payments made from sponsor's general assets.

Nonmonetary Compensation

- Promotional gifts of nominal value, e.g., coffee mugs, pens, calendars with logos do not have to be reported because are presumed to be of nominal value
  - But $400 golf club or expensive pen with company logo must be reported
- Holiday gifts based solely on personal relationships do not have to be reported
- Gift must be tax deductible by provider and does not create taxable income to recipient
- Single gift must be valued at less than $50
- $100 max limit on gifts from one provider in a calendar year
  - If $100 limit exceeded, then value of all gifts over $10 must be reported

Free Business Meals and Entertainments

- Excluded if not provided because of the recipient's position with the plan, or the amount of services provided to or business conducted with an ERISA plan.
- Example: Foley & Lardner LLP sponsors a hospitality suite at an ERISA business conference. Attendees are Foley clients and non-clients. Anyone who attends the conference can attend.

Educational Conferences – Reportable

- Consulting firm sponsors an educational conference for its clients' human resource staff. Firm pays for travel, hotel, food, entertainment
- Would be reportable Indirect Compensation because provided due to attendees' positions with ERISA plan
- But conference overhead (speaker fees, audio visual equipment rental fees, cost of conference rooms) is excludable

Educational Conferences – Reportable Cont'd

- Exception so expenses do not have to be reported: if a plan fiduciary who did not attend conference states in writing in advance of conference that
  - Plan trust's payment of educational expenses would be prudent
  - Payment of expenses are consistent with plan's written policy designed to prevent abuse
  - Conference reasonably related to attendees' duties
  - Expenses are reasonable in light of benefits afforded
  - Attendees' judgment about consulting firm not compromised because of conference

How to Allocate Indirect Compensation if Multiple Plans

- Any reasonable method is permitted provided method is disclosed to sponsor

Cram Session

Health & Welfare Plans

- Unfunded self-insured plans, or fully insured plans (or a combination) do not have to file Schedule C
- Plans funded through a trust such as a VEBA are required to file a Schedule C
- Direct Compensation examples - Fees charged for
  - Per each claim processed
  - Each benefit eligibility question and response
  - Claim status request and response

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Cram Session

Health & Welfare Plans – Cont'd

- Pharmacy Benefit Managers (PBMs) are TPAs for prescription drug programs—processing/paying RX claims, help maintain drug formulary, maintain networks of retail pharmacies
- PBMs can receive fees that are Reportable Compensation
- Direct Compensation examples: dispensing fees, administration fees
- Currently, drug companies' payment of rebates/discounts to PBMs generally do not need to be treated as Reportable Indirect Compensation. Department of Labor is considering this question.

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Cram Session

Providers Who Fail to Supply Information to Sponsor

- Sponsors are required to name any provider who fails to provide information on Schedule C
- DOL cautions sponsors to contact provider to request information and to notify them that they will be named on the Schedule C as failing to providing information if they do not comply

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Fiduciary Fundamentals

Proposed New Definition of Fiduciary

Christopher S. Berry

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EBSA Announcement
(October 22, 2010)

- **Proposed Regulation:** DOL Regulation §2520.3-21
- **Public Comment Period:** On or before January 20, 2011 (extended to February 3, 2011)
- **Public Hearing**: March 1-2, 2011
- **Effective Date:** 180 days after publication of final regulations

Consequences of Being a Fiduciary

- **Duties and Responsibilities**
- **Prohibited Transactions**
- **Personal Liability**

Statutory Definition of "Fiduciary"

- Section 3(21)(A) of the Employee Retirement Income Security Act defines a "fiduciary" by providing that a person is a fiduciary with respect to a plan to the extent:
  - the person exercises any discretionary authority or discretionary control with respect to management of such plan or exercises any authority or control with respect to management or disposition of its assets;
  - the person "renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so"; or
  - the person has discretionary authority or discretionary responsibility in the administration of such plan.

Regulatory Definition of "Fiduciary"

Current	Proposed
For advice to constitute "investment advice", a person (who does not have discretionary authority or control with respect to the purchase or sale of securities or other property for the plan) must: 1. render the advice as to the value of securities or other property, or make recommendations as to the advisability of investing in, purchasing or selling securities or other property, 2. on a regular basis; 3. that pursuant to a mutual agreement, arrangement or understanding with the plan or a plan fiduciary;	A person will be considered a "fiduciary" if the person meets all parts of a three-part test: Part One: The person is doing any of the following on behalf of a plan, plan fiduciary, plan participant or beneficiary: 1. provide advice, or an appraisal or fairness opinion, concerning the value of securities or other property; 2. make recommendations as to the advisability of investing in, purchasing, holding, or selling securities or other property; or

Fiduciary Fundamentals

Regulatory Definition of "Fiduciary" – Con't

Current	Proposed
4. will serve as a primary basis for investment decisions with respect to plan assets; and 5. will be individualized based on the particular needs of the plan.	Part One: Con't 3. provide advice or make recommendation as to the management of securities or other property. Part Two: The person meets one of the following conditions: 1. represent or acknowledge that it is acting as a fiduciary within the meaning of ERISA with respect to providing advice or making recommendations as described above; 2. be a plan fiduciary within the meaning of the other provisions of ERISA Section 3(21);

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Fiduciary Fundamentals

Regulatory Definition of "Fiduciary" – Con't

Current	Proposed
	Part Two: Con't 3. be an investment adviser with the meaning of Section 202(a)(11) of the Investment Advisers Act of 1940; or 4. provide advice or make recommendations as described above under an agreement, arrangement or understanding, written or otherwise, between such person and the plan, plan fiduciary, plan participant or beneficiary that such advice may be considered in connection with making investment or management decisions with respect to plan assets and will be individualized to the needs of the plan, plan fiduciary, participant or beneficiary.

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Regulatory Definition of "Fiduciary" – Con't

Current	Proposed
	Part Three: The person must render investment advice for a fee or other compensation, whether direct or indirect, which includes any fee or compensation for the advice received by the person (or an affiliate) from any source and any fee or compensation incident to the transaction in which the investment advice has been rendered or will be rendered.

Comments

- 193 comment letters received: "Goldilocks effect"
- fiduciary investment advice under ERISA "should be construed broadly to include recommendations regarding plan distributions, the management of securities, investment manager selection, and asset allocation"
- proposed definition should address whether making a recommendation with respect to taking a permitted distribution constitutes investment advice

Fiduciary Fundamentals

Comments – Con't

- proposed definition raises concerns about "unintended fiduciaries"
- proposed definition could have a serious and detrimental impact on the number and quality of ESOPs

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In the Spotlight

Plan and Service Provider Fee Disclosures – An Overview

Galen R. Mason

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In the Spotlight

Background

- The DOL Fee Transparency Initiative:
  - Plan Disclosures to the Government
  - Plan Disclosures to Participants
    - 29 C.F.R. 2550.404a-5 (Issued October 14, 2010)
    - Effective Date: Plan years on or after 11/1/11
    - Need to assemble this info DURING 2011
  - Service Provider Disclosures to the Plan
    - 29 C.F.R. 2550.408b-2 (Issued July 15, 2010)
    - Effective Date: July 16, 2011; extended to January 1, 2012
    - Service Providers need to assemble this info DURING 2011
- Fee Litigation

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In the Spotlight

Disclosure to Participants

29 C.F.R. 2550.404a-5

- Applies to employee benefit plans that provide participants with investment discretion (generally 401(k) and 403(b) plans).
  - Unlike other disclosure requirements that may be waived for plans with few participants or small total balances, the new regulation applies to all plans, regardless of size.
- Applies to the plan administrator (and not all fiduciaries as was in the proposed rule). *Plan administrators may, however, reasonably rely on information provided by service providers and investment issuers in making the disclosures.*
- Requires detailed content and both advanced general disclosures as well as regular updates on actual expenses and any changes.
- The new rule takes effect for plan years beginning after November 1, 2011 — thus, January 1, 2012 for most participants.
- Disclosures made pursuant to the new regulation may be made using existing distribution methods.

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In the Spotlight

What must be disclosed about the Plan

- Information that must be disclosed about the plan is broken into three categories:
- **General Information**
  1. an explanation as to when participants and beneficiaries may give investment instructions,
  2. an explanation of any specific limits on investment instructions, including transfers between investment options,
  3. a description of or reference to plan provisions relating to voting, tender, and similar rights for investment options,
  4. identification of the "designated investment alternatives" available under the plan,
  5. identification of any investment managers, and
  6. a description of a brokerage window or similar arrangement, if any.

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What must be disclosed about the Plan – Con't

- **Administrative expenses** (e.g., legal, accounting, recordkeeping, and so forth) that may be charged to a participant's account must be disclosed as well as how such charges will be allocated (e.g., pro rata or per capita).
  - For plans with revenue-sharing arrangements that might make overall administrative expenses appear lower than they may actually be, the quarterly disclosure must include explicit language noting the existence of a revenue-sharing arrangement.
- **Individual expenses**
  - Examples: plan loans, QDROs, investment advice, and so forth

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When to disclose plan information

- **Advance Disclosures** (and at least annually thereafter)
  - "on or before the date a participant can direct his or her investments and at least annually thereafter"
    - Ok to include with SPD or pension benefits statement IF those documents are provided on a schedule that meets the disclosure regulation's annual timing requirement.
    - Notices must be distributed to all eligible employees (not just those already participating in the plan). This requirement makes sense given that the purpose of the information is to help participants choose whether to participate in the plan as well as to choose and monitor specific investment selections.
- **As Needed – Changed Plan Information**
  - Updates must be provided at least 90 days, but no more than 30 days before a change becomes effective.
  - Reasonableness exception to the 90/30 day window for events that could not be anticipated (e.g., the need to quickly change an investment option under the plan)
  - The updating requirement is not subject to a materiality exception. That is, the DOL believes that any change in plan or expense information is, in general, material.
- **Quarterly Updates**
  - Required for actual administrative and individual expenses

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In the Spotlight

Investment Options – What information must be disclosed

- **Automatic Disclosures** (i.e., regardless of whether a participant invests in the product)
  - MUST be in chart format. Chart must prominently display:
    - the name of the plan administrator, the date of the information provided, a statement that more current information is available at a listed web site
  - Use of the model chart will constitute compliance with the new regulation

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Investment Options – What information must be disclosed – Con't

- Automatic information required to be disclosed for each designated investment alternative includes:
  1. identifying information for the investment product (e.g., name and type of investment);
  2. investment product performance data
     - with fixed-return products disclosing the fixed rate of return and the term of the investment
     - investment products without a fixed rate of return disclosing the average annual return, if available, for the most recent one-year, five-year, and 10-year periods;
  3. relevant benchmarks that must be broad based and not related to investment product provider;
  4. fee and expense information, including shareholder-type fees (in other words, fees billed directly against a participant's investment such as sales loads), total annual operating expenses expressed as a percentage with a specific requirement that an example of the total annual operating expense ratio be given using a hypothetical $1000 investment, as well as a requirement that specific statements on the impact of fees on performance be included;
  5. a web site for obtaining additional information that, among other things, must include information on a description of the investment's goals and objectives, principle strategies and attendant risks, portfolio turnover rates (i.e., how frequently the investment product buys and sells securities), and quarterly performance updates, among other things; and
  6. a glossary of terms to assist participants in understanding the investment alternatives or a Web site that provides such a glossary.
- There also are special rules for...
  – Annuities: In lieu of investment the standard investment related information, provide basic information about the benefits and costs of the annuity (surrender charges, fees etc.) as well as a website with specific info
  – Employer Stock Fund: Modified disclosures (e.g., website rather than disclose the investments principal strategies, a reminder of the importance of diversification is required; also no portfolio turnover disclosure requirement)

Investment Options – What information must be disclosed – Con't

- Plan administrators are free to provide additional information so long as it is not misleading. For example, this may include development of more appropriate benchmarks for investment alternatives composed of blended securities.
- Designated investment alternative does not include "brokerage windows" – (expense must be noted in the individual expense section)

In the Spotlight

APPENDIX to §2550.404a-5 – Model Comparative Chart

1

ABC Corporation 401k Retirement Plan
Investment Options – January 1, 20XX

This document includes important information to help you compare the investment options under your retirement plan. If you want additional information about your investment options, you can go to the specific Internet Web site address shown below or you can contact [insert name of plan administrator or designee] at [insert telephone number and address]. A free paper copy of the information available on the Web site[s] can be obtained by contacting [insert name of plan administrator or designee] at [insert telephone number].

Document Summary

This document has 3 parts. Part I consists of performance information for plan investment options. This part shows you how well the investments have performed in the past. Part II shows you the fees and expenses you will pay if you invest in an option. Part III contains information about the annuity options under your retirement plan.

Part I. Performance Information 2

Table 1 focuses on the performance of investment options that do not have a fixed or stated rate of return. Table 1 shows how these options have performed over time and allows you to compare them with an appropriate benchmark for the same time periods. Past performance does not guarantee how the investment option will perform in the future. Your investment in these options could lose money. Information about an option's principal risks is available on the Web site[s].

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Table 1—Variable Return Investments

Name/ Type of Option	Average Annual Total Return as of 12/31/XX 1yr.	5yr.	10yr.	Since Inception	Benchmark 1yr.	5yr.	10yr.	Since Inception
Equity Funds								
A Index Fund/ S&P 500 www. website address	26.5%	.34%	-1.03%	9.25%	26.46%	.42%	-.95%	9.30%
					S&P 500			
B Fund/ Large Cap www. website address	27.6%	.99%	N/A	2.26%	27.80%	1.02%	N/A	2.77%
					US Prime Market 750 Index			
C Fund/ Int'l Stock www. website address	36.73%	5.26%	2.29%	9.37%	40.40%	5.40%	2.40%	12.09%
					MSCI EAFE			
D Fund/ Mid Cap www. website address	40.22%	2.28%	6.13%	3.29%	46.29%	2.40%	-.52%	4.16%
					Russell Midcap			
Bond Funds								
E Fund/ Bond Index www. website address	6.45%	4.43%	6.08%	7.08%	5.93%	4.97%	6.33%	7.01%
					Barclays Cap. Aggr. Bd.			
Other								
F Fund/ GICs	.72%	3.36%	3.11%	5.56%	1.8%	3.1%	3.3%	5.75%

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www. website address					3-month US T-Bill Index			
G Fund/ Stable Value www. website address	4.36%	4.64%	5.07%	3.75%	1.8%	3.1%	3.3%	4.99%
					3-month US T-Bill Index			
Generations 2020/ Lifecycle Fund www. website address	27.94%	N/A	N/A	2.45%	26.46%	N/A	N/A	3.09%
					S&P 500			
					23.95%	N/A	N/A	3.74%
					Generations 2020 Composite Index*			

*Generations 2020 composite index is a combination of a total market index and a US aggregate bond index proportional to the equity/bond allocation in the Generations 2020 Fund.

Table 2 focuses on the performance of investment options that have a fixed or stated rate of return. Table 2 shows the annual rate of return of each such option, the term or length of time that you will earn this rate of return, and other information relevant to performance.

Table 2—Fixed Return Investments

Name/ Type of Option	Return	Term	Other
H 200X/ GIC www. website address	4%	2 Yr.	The rate of return does not change during the stated term.
I LIBOR Plus/ Fixed-Type Investment Account www. website address	LIBOR +2%	Quarterly	The rate of return on 12/31/xx was 2.45%. This rate is fixed quarterly, but will never fall below a guaranteed minimum rate of 2%. Current rate of return information is available on the option's Web site or at 1-800-yyy-zzzz.
J Financial Services Co./ Fixed Account Investment www. website address	3.75%	6 Mos.	The rate of return on 12/31/xx was 3.75%. This rate of return is fixed for six months. Current rate of return information is available on the option's Web site or at 1-800-yyy-zzzz.

Part II. Fee and Expense Information

Table 3 shows fee and expense information for the investment options listed in Table1 and Table 2. Table 3 shows the Total Annual Operating Expenses of the options in Table 1. Total Annual Operating Expenses are expenses that reduce the rate of return of the investment option. Table 3 also shows Shareholder-type Fees. These fees are in addition to Total Annual Operating Expenses.

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Table 3—Fees and Expenses

Name / Type of Option	Total Annual Operating Expenses As a %	Per $1000	Shareholder-Type Fees
Equity Funds			
A Index Fund/ S&P 500	0.18%	$1.80	$20 annual service charge subtracted from investments held in this option if valued at less than $10,000.
B Fund/ Large Cap	2.45%	$24.50	2.25% deferred sales charge subtracted from amounts withdrawn within 12 months of purchase.
C Fund/ International	0.79%	$7.90	5.75% sales charge subtracted from amounts invested.

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Stock		
D Fund/ Mid Cap ETF	0.20% $2.00	4.25% sales charge subtracted from amounts withdrawn.
Bond Funds		
E Fund/ Bond Index	0.50% $5.00	N/A
Other		
F Fund/ GICs	0.46% $4.60	10% charge subtracted from amounts withdrawn within 18 months of initial investment.
G Fund/ Stable Value	0.65% $6.50	Amounts withdrawn may not be transferred to a competing option for 90 days after withdrawal.
Generations 2020/ Lifecycle Fund	1.50% $15.00	Excessive trading restricts additional purchases (other than contributions and loan repayments) for 85 days.
Fixed Return Investments		
H 200X / GIC	N/A	12% charge subtracted from amounts withdrawn before maturity.
I LIBOR Plus/ Fixed-Type Invest Account	N/A	5% contingent deferred sales charge subtracted from amounts withdrawn; charge reduced by 1% on 12-month anniversary of each investment.
J Financial Serv Co. / Fixed Account Investment	N/A	90 days of interest subtracted from amounts withdrawn before maturity.

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The cumulative effect of fees and expenses can substantially reduce the growth of your retirement savings. Visit the Department of Labor's Web site for an example showing the long-term effect of fees and expenses at http://www.dol.gov/ebsa/publications/401k employee.html. Fees and expenses are only one of many factors to consider when you decide to invest in an option. You may also want to think about whether an investment in a particular option, along with your other investments, will help you achieve your financial goals.

Part III. Annuity Information

Table 4 focuses on the annuity options under the plan. Annuities are insurance contracts that allow you to receive a guaranteed stream of payments at regular intervals, usually beginning when you retire and lasting for your entire life. Annuities are issued by insurance companies. Guarantees of an insurance company are subject to its long-term financial strength and claims-paying ability.

Table 4—Annuity Options

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Name	Objectives / Goals	Pricing Factors	Restrictions / Fees
Lifetime Income Option www. website address	To provide a guaranteed stream of income for your life, based on shares you acquire while you work. At age 65, you will receive monthly payments of $10 for each share you own, for your life. For example, if	The cost of each share depends on your age and interest rates when you buy it. Ordinarily the closer you are to retirement, the more it will cost you to buy a share.	Payment amounts are based on your life expectancy only and would be reduced if you choose a spousal joint and survivor benefit. You will pay a 25%

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In the Spotlight

	you own 30 shares at age 65, you will receive $300 per month over your life.	The cost includes a guaranteed death benefit payable to a spouse or beneficiary if you die before payments begin. The death benefit is the total amount of your contributions, less any withdrawals.	surrender charge for any amount you withdraw before annuity payments begin. If your income payments are less than $50 per month, the option's issuer may combine payments and pay you less frequently, or return to you the larger of your net contributions or the cash-out value of your income shares.
Generations 2020 Variable Annuity Option www. website address	To provide a guaranteed stream of income for your life, or some other period of time, based on your account balance in the Generations 2020 Lifecycle Fund. This option is available through a variable annuity contract that your plan has with ABC Insurance Company.	You have the right to elect fixed annuity payments in the form of a life annuity, a joint and survivor annuity, or a life annuity with a term certain, but the payment amounts will vary based on the benefit you choose. The cost of this right is included in the Total Annual Operating Expenses of the Generations 2020 Lifecycle Fund, listed in Table 3 above. The cost also includes a guaranteed death benefit payable to a spouse or beneficiary if you die before payments begin. The death benefit is the greater of your account balance or contributions, less any withdrawals.	Maximum surrender charge of 8% of account balance. Maximum transfer fee of $30 for each transfer over 12 in a year. Annual service charge of $50 for account balances below $100,000.

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Please visit www.ABCPlanglossary.com for a glossary of investment terms relevant to the investment options under this plan. This glossary is intended to help you better understand your options.

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Investment Options – What information must be disclosed – Con't

- **Post-Investment Disclosures**
  – Information that must be disclosed subsequent to a participant's investment includes any materials provided to the plan relating to the exercise of voting, tender, and similar rights that pass through to the plan participant.
- **Upon Request**
  – Must be provided various governing documents (e.g., prospectus, financial statements, or reports).

Investment Options – When to disclose

- **Advance Disclosures** (and at least annually "thereafter")
  – "on or before the date a participant can direct his or her investments and at least annually thereafter"
- **As Needed – Changed Plan Information**
  – Updates must be provided at least 90 days, but no more than 30 days before a change becomes effective.

In the Spotlight

Service Provider Disclosures to Plan Sponsors

29 CFR 2550.408b-2

- Purpose: To arm fiduciaries with information necessary to understand service provider compensation and possible conflicts of interest
- Operation/design of the rule:
  - ERISA 404(a) requires fiduciaries to act prudently and solely in the interests of plan participants
  - Furnishing of goods, services or facilities between plan and a party in interest is a PT - 406(a)(1)(c)
  - Statutory class exemption from ERISA's prohibited transaction rules - "Reasonable Contract or Arrangement under 408(b)(2)"
  - PTCE 408(b)(2) permits such activity if the arrangement is reasonable, the services are necessary and no more than reasonable compensation is paid.

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Disclosure Rule Basics Cont.

- Generally applicable to defined contribution and defined benefit retirement plans
  - NOT SEPs, SIMPLE retirement accounts or IRAs
  - NOT welfare plans
- Applicable to service providers that enter into contracts or arrangements with plans and reasonably expect to receive $1,000 or more in direct or indirect compensation.
- Extended to January 1, 2012 (from July 2010). Applies to arrangements in effect on January 1, 2012 and any entered into thereafter.
- Consequences for failure to comply: Excise tax

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Which Service Providers Must Comply

- There doesn't have to be a written contract (but the disclosures do need to be in writing)
- Covered Service Providers ("CSP"):
  - $1000 requirement
  - Three categories of CSPs:
    - Providing services as an ERISA fiduciary or as an Investment Adviser
      - Providing services directly to the plan
      - Providing services to an investment contract, product or entity holding plan assets (i.e., services to an investment vehicle)
      - (registered) Investment Advisers providing services directly to the covered plan
    - Service providers of recordkeeping services or brokerage services to an individual account plan ("IAP") that allows participants to direct their own accounts if one or more designated investment alternative is made available
    - Where a service provider (or an affiliate or subcontractor) reasonably expects to receive indirect compensation
      - Accounting, audit, actuarial, appraisal, banking, consulting, custodial, insurance, investment advisory, legal, recordkeeping, securities etc.
  - SP doesn't automatically become a CSP because they provide services to a CSP
    - Who has to make the disclosure? Look to the service provider directly responsible to the plan. For example, a record keeper to a CIF isn't a CSP just because a plan invests in the CIF.

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What must the CSP disclose?

- No particular format required (DOL considering a "summary" requirement as well as a sample form)
  - Can be disclosed in multiple documents
- Specific Content of Initial Disclosure:
  - Description of Services – adequacy determined by responsible fiduciary
  - Status as CSP -- "Whether you're an ERISA fiduciary or an Investment Adviser" or both
  - Description of the Compensation – Fees (money or anything of value) that a SP or its affiliates ***reasonably expects to receive*** in connection with services provided to the plan OR financial products in which plan assets are invested
    - Direct AND Indirect compensation
    - Direct compensation can be in the aggregate or by service
    - Ok to use formulas, references to a percentage of assets or per capita charge
    - Indirect comp – description of the services for which received, amount, and identification of the payer
    - Splitting (amongst the CSP and subs/affiliates) must be disclosed when its calculated on a transaction basis (e.g., commissions, soft dollars, finders fees etc.) OR if it is charged directly against the plan asset value (e.g., 12b-1 fees)
  - Termination Fees -- Any fees expected from termination and how any prepaid amounts would be refunded (termination fees are reasonable, but must be limited to actual costs)
  - Method of Payment -- Description of the manner in which comp received (deducted directly from plan accounts or invoiced?)
  - Special rule for Recordkeeping Services -- If the cost is offset by indirect investment charges, the CSP must prepare an estimate for single purchase cost.
  - Special rule for certain CSP fiduciaries – Must disclose certain comp/expense info for each investment contract that will be charged directly against the asset
  - Special rule for CSPs providing recordkeeping or brokerage services to IAPs -- Must disclose certain comp/expense info for each designated investment alternative (can generally rely on underlying investment materials) that will be charged directly against the asset

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When must it be disclosed?

- In advance of entering into, extending or renewing a contract or arrangement
- If you become a covered service provider at some later point in time, then within 30 days of learning of that information
- For changed info, must disclose to the plan fiduciary as soon as practicable, but not later than 60 days (DOL struck the materiality component)
- Any info that the plan sponsor requests in writing (in order to comply with their duties and reporting) – must provide no later than 30 days
- Disclosure Errors – (if made in good faith despite reasonable diligence) must be corrected within 30 days of discovery

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What to do if a CSP doesn't disclose

- Plan fiduciary is protected if they "reasonably believed" the CSP disclosed all necessary information.
- Disclosure failures must be addressed. If a CSP fails to respond to a written request within 90 days then the fiduciary must notify the DOL or within 30 days of CSP's refusal to do so.
  - CSP will continue to be in a PT (and possible excise tax) until terminated or the disclosure is cured. Relieves the fiduciary of any PT liability
  - Notice must contain specific info (plan name/number, plan sponsor, CSP name etc.)
- Don't have to automatically fire the CSP, but…
  - In making that determination, the plan fiduciary must take into consideration not only the failure to disclose but also the availability, qualifications, and cost of obtaining a replacement service provider.
  - Once a service provider makes the required disclosures, the provider will no longer be subject to the prohibited transaction penalties.

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Action Steps – Plan Sponsors

- Designate compliance responsibility. Appoint a person or committee to develop a strategy and timeline for complying with the disclosure requirements.
- Make a list of sources from whom this person will need to solicit information.
- Contact every provider to determine how and when the service provider will be providing the 408(b)(2) fee information and develop a plan for assimilating this information into a chart format.

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Actions Steps – Service Providers

- Furnish investment-related information disclosures in a chart or similar format that permits straightforward comparison of the plan's designated investment alternatives by participants and beneficiaries, pursuant to the proposed regulations under Sections 404(a) and Section 404(c).
- Evaluate internal fee/compensation structures and prepare appropriate client disclosures.
  - Determine whether existing disclosures can be incorporated by reference.
- Explain to clients how compensation arrangements are reasonable with respect to the services being rendered.

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Questions & Answers

Employee Benefits Broadcast

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Mark Your Calendar

- The 2011 Employee Benefits Broadcast Series will take place on the following dates:
  - April 26, 2011
  - July 26, 2011
  - October 25, 2011

Employee Benefits Broadcast

Thank You

- A copy of the PowerPoint presentation and a multimedia recording will be available on Foley's website within 24 to 48 hours:

  http://www.foley.com/news/event_detail.aspx?eventid=3619
- We welcome your feedback. Please take a few moments before you leave the web conference today to provide us with your feedback:

  http://www.zoomerang.com/Survey/WEB22BX839E52R/