

# 404a-5 REVISITED: OPPORTUNITIES FOR ADVISORS

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## Disclaimer

- The information in this presentation is general in nature and not intended to be a substitute for legal or tax advice.
- Please consult a qualified professional such as an attorney or accountant if you need legal or tax advice.

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## Learning Objectives

- I. Address the challenges that surfaced during preparation of the initial ERISA 404a-5 notices
- II. Identify action items related to ongoing ERISA 404a-5 notices (quarterly and annual)
- III. Identify key areas in which advisers can assist clients in these obligations

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## What Steps Need to be Taken Now

- Initial notices that were provided by August 30 - consider whether an updated notice as to investment changes and administrative fees needs to be provided
- Quarterly information statements (administrative and individual fees deducted from participant accounts) – begins no later than November 14, 2012
- Annual Notice – consider timing and whether it should be sent with other documents (SPD, pension benefit statement)
- Notice to Newly Eligible Employees

**Advisor Opportunity:** Assist client in establishing a process as to contents of notice, identification of recipients of the notice, timing and manner of providing the notice, and updating it.

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## Compiling Contents of the Notice

- Who creates the notice
  - Most investment and service providers are assisting plan sponsors with the creation of the notice
  - Generally in a draft form that must be customized for each plan
  - Plan Sponsors responsible for ensuring service providers input correct information

### Advisor Opportunity:

- Assist in identifying what the service providers are doing and any gaps
- Advise on process of identifying internally who will answer participant questions
- Assist in cover letter or e-mail
- Assist in possible reduction in number of DIAs in plan
- Educate on benefits of involuntary cash-outs

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## Identifying Recipients of the Notice

- Who gets the notice
  - All eligible participants whether actively participating or not
  - Any terminated participants with a balance in the plan
  - Beneficiaries with a balance in the plan

### Advisor Opportunity:

- Assist in identifying delivery model for each service provider (i.e., they may differ)
- Educate client on locating missing participants
- Assist in documenting who received notice
- Assist in establishing a process for newly eligible employees after initial effective date

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## Delivery Method Considerations

- Delivery Methods (U.S. Mail, Hand Delivery, Electronic)

**Advisor Opportunity:** Educate Client on electronic delivery method

- Different rules apply for different parts of the notice, but to deliver the complete notice electronically, it must satisfy the two guidelines below
- Generally will not work for terminated employees
- 1) E-Delivery Safe Harbor
  - Participant e-mail address
  - Ensuring receipt
  - Protect confidentiality
  - Same style as paper notice
  - E-mail conveys significance of document
  - Ability to receive paper copy
  - Affirmative consent for electronic delivery

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## Delivery Method Considerations (Continued)

- 2) Alternative E-Delivery Requirements
  - Voluntary provision of e-mail address
  - Reasonable steps to ensure receipt
  - Protect confidentiality
  - Notices must be written so that average participant can understand them

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## Consequences of Non-Compliance

- 404a-5 is a fiduciary rule that places the disclosure obligation on the Plan administrator (typically, the plan sponsor or committee) – which means failure to comply is a fiduciary breach
- 404a-5 is now a disclosure requirement of 404(c) which means if there is a failure to comply, the 404(c) safe harbor defense is unavailable

**Advisor Opportunity:** Assist Client in addressing the challenges to insure compliance

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## Addressing the Challenges- Self-Directed Brokerage Accounts (SDBAs)

- Field Assistance Bulletin 2012-02R – DOL clarified that there is no obligation to disclose (or investigate or monitor) investments within the SDBA
- Must still prudently select and monitor the SDBA provider
- Must describe the operation and availability of the SDBA
- Must provide an explanation of the fees and expenses that may be charged against the participant's account (e.g., start-up fees, termination fees, ongoing expenses, commissions, trading fees, front or back-end sales loads)
- Must provide a statement of fees actually charged during preceding quarter

**Advisor Opportunity:** Assist Client in prudently selecting and monitoring providers of self-directed brokerage accounts (e.g., benchmarking) and in updating IPS to reflect these rules

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## Addressing the Challenges- Asset Allocation Models

- FAB 2012-02 – DOL addressed designated investment alternative (DIA) status of asset allocation models
- Unitized model portfolios are DIAs – one in which participant acquires an “equity security, unit of participation, or similar interest in an entity that, itself, invests in some combination of the plan’s DIAs”
- Asset allocation will avoid DIA status if:
  - Clearly presented to participants as merely a means of allocating among Plan’s DIAs
  - Clearly explain how it functions and how it differs from Plan’s DIAs

**Advisor Opportunity:** Assist Client in preparing a participant disclosure that clearly explains how the asset allocation service functions and how it differs from a DIA.

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## Addressing the Challenges- Disclosure of Advisory Fees

- Must be disclosed if advisor is paid from plan assets and fee is charged to participant accounts (not applicable if paid by employer from its general assets or from a forfeiture account)
- Must clearly identify the service, the cost of the services and the plan’s allocation method (e.g., pro rata)

**Advisor Opportunity:** Assist Client in identifying fees that are subject to disclosure and describing the participant charge and allocation method

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## Other Challenges

- Identification of certain fees (distribution, loans, non-routine fees, expense reimbursement accounts, revenue sharing offsets)
- Information related to structure and mechanics of plan
- Properly identifying DIAs – including closed options
- Accessibility of website and participant-friendly format

**Advisor Opportunity:** Assist Client in identifying fees, engaging in a prudent process to evaluate reasonableness of fees (e.g., benchmarking), identifying DIAs and constructing website format

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## 404a-5 Disclosure: Quarterly Statements

- Quarterly Fee and Expense Information
  - Amounts and details regarding administrative and individual fees deducted from the participant's account
  - Quarterly beginning no later than November 14, 2012
  - Estimated to affect 72 million participants
  - Estimated that 83% of participants are unaware that they are paying fees
- Stated goal of the DOL in issuing this regulation is to *lower* fees and expenses charged to participants

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## Quarterly Statements Cont.

### Advisor Opportunity:

- Assist in reviewing what fees have previously been disclosed on statements and what fees participants are seeing for the first time
- Educate and advise on identifying who internally will handle questions from participants
- Assist in holding employee education meetings or create employee communication
- Assist in reviewing 408(b)(2) Notices and benchmarks to ensure that investments are still prudent and fees are still reasonable

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## Ongoing 404a-5 Notices

### Advisor Opportunity: Assist client in providing annual 404a-5 Notice

- When to send each year?
- Who will send?
- How will it be sent?
- Who will ensure information is updated?

### Advisory Opportunity: Assist client in providing 404a-5 Notice to newly eligible employees

- Establish a process to identify and provide notices to new participants
- Notices must be distributed prior to enrolling and making investment elections
- Can distribute notices with enrollment materials and Summary Plan Description

### Advisor Opportunity: Assist client in providing updated notices for investment changes and changes in administrative fees

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## Conclusion

Opportunity exists for advisors to help close the gap between providers, plan sponsors and participants

- Know what your service providers are delivering to your clients
- Review investment options and fees with your clients
- Perform 404(c) audit and incorporate 404a-5 notices
- Help your clients create processes for distribution of notices
- Create an education campaign for participants
- Incorporate ongoing 404a-5 discussion into your regular Plan Sponsor committee meetings and participant education meetings

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## Questions



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