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A Client Alert from Paul Hastings

PAUL HASTINGS

October 2011

Model Participant-Directed Defined Contribution Plan Investment/Expense Disclosure Package

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Last year, the Department of Labor issued a regulation, 29 C.F.R. § 2550.404a-5, requiring plan administrators of 401(k) and other defined contribution plans that permit participants to direct how their accounts are invested to provide, starting next year, very detailed investment and expense information.[1] To comply, (1) a special notice must be given to existing participants no later than the effective date described below; (2) thereafter, this special notice must also be given to a participant (normally, a new participant) before he or she first becomes eligible to direct plan investments; (3) the special notice also must be given at least annually and when certain information in it changes; and (4) other special information must be included in quarterly benefit statements.

The Department of Labor's new disclosure regulation does not provide a comprehensive model disclosure package, although it does include a form of comparative chart that would satisfy some of the new requirements. Because that chart does not satisfy all of the new disclosure requirements, we created the copyrighted model package attached to this client alert, which incorporates a slightly modified version of the Department of Labor chart. Our model package is intended to be a starting point from which plan administrators can develop customized disclosures that will satisfy all of the new requirements. A Word copy, which we likely will update from time to time, is available at http://www.paulhastings.com/assets/news/ModelFeeandExpenseDisclosureNotice.DOC[2]

A few comments about the new disclosure requirements and our model package are in order:

Effective Date: The new disclosures are required for plan years beginning on or after November 1, 2011. However, the initial/annual notice does not have to be distributed before the later of (i) 60 days after the beginning of the plan year, or (ii) May 31, 2012. Thus, for calendar year plans, the deadline for first providing the initial/annual notice would be May 31, 2012. For a calendar year plan, quarterly benefit statements will need to contain the extra information required by the new disclosure regulation starting with statements for the second quarter 2012, which must be furnished no later than August 14, 2012.

Model Package: Our package consists of an initial/annual notice form and a list of new disclosures that must be included in quarterly benefit statements. The initial/annual notice form is designed to supplement, but not replace, existing SPD or other investment information. Nevertheless, we recommend revising existing investment information disclosures to be consistent with and refer to the initial/annual notice, and to include an Internet link to it. The initial/annual form needs to be

customized for each plan. We have included explanations in our model form that are intended to assist plan sponsors in customizing for their plans.

Fiduciary Liability: The underlying legal premise of 29 C.F.R. § 2550.404a-5 is questionable -- that the Department of Labor has the power to create a highly specific disclosure *fiduciary* duty, to impose it on *plan administrators* without regard to how their plans allocate fiduciary responsibilities, and to declare that the only possible way of satisfying the new disclosure obligation is perfect compliance with a maze of complicated requirements. We are unaware of any other fiduciary duty requirement that can only be satisfied in one highly complicated way.

Nevertheless, the Department of Labor apparently intends any violation of 29 C.F.R. § 2550.404a-5 to be a *per se* fiduciary breach, with the consequence that a plan administrator who violates it could be held liable for any resulting damages, which might include investment losses as well as excessive fees. For this reason and to secure Section 404(c) protection (discussed below) if sought, we counsel strict compliance.

Section 404(c): ERISA Section 404(c) creates a safe harbor for participant-directed defined contribution plan investments. If every one of the many complicated requirements in the Department of Labor's Section 404(c) regulations, 29 C.F.R. § 2550.404c-1, are satisfied, then the Department takes the position that plan fiduciaries are not responsible for the investment choices participants make, although the fiduciaries remain responsible for losses resulting from investment options they imprudently make available. *The Department of Labor has amended its Section 404(c) regulations to make compliance with the new disclosure requirements a mandatory condition for securing Section 404(c) protection.* This requirement generally supersedes the corresponding disclosure requirements that the Department's Section 404(c) regulations previously required.

Electronic Disclosure: ERISA Technical Release 2011-03 (issued September 13, 2011) sets forth the electronic disclosure alternatives for providing the investment/expense disclosures discussed in this client alert. These include several new alternatives, but the Department of Labor has not yet materially liberalized its restrictive position on electronic disclosure.

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If you have any questions concerning the new disclosure requirements or if we can help you comply with them, please do not hesitate to contact any of the following Paul Hastings lawyers:

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[1] For a summary of these regulations, please see our client alert, *Adrift in a Sea of Disclosure: New DOL Rules Require Disclosure of Plan Fees to Participants* (October 2010), available at http://www.paulhastings.com/Publications.

[2] Paul Hastings LLP authorizes any employer to use the model package to create customized disclosures in connection with the defined contribution plans it sponsors for its own employees. This model is for informational purposes only, however, and does not constitute legal advice. Employers should work with us or other legal counsel to ensure that their disclosures are accurate, consistent, protective, and legally compliant. The use of this model package for commercial purposes or by institutions or individuals in the course of their business of administering benefit plans, or assisting their clients or customers to administer defined contribution plans, is forbidden without the express written approval of Paul Hastings LLP.

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Government-Required Notice About [NAME OF DC PLAN] (Plan) Investments and Expenses[1]

This Notice Was Last Updated on [DATE]

The U.S. government requires us to provide this notice to you. It duplicates some information we already provide you by other means, but it contains additional information that you might find useful.

[OPTIONAL LANGUAGE FOR INTERIM UPDATES, WHICH ARE REQUIRED WHENEVER THE INFORMATION IN ITEMS 1-[8]] BELOW CHANGES. NOTICE MUST BE GIVEN AT LEAST 30 DAYS, BUT NOT MORE THAN 90 DAYS, IN ADVANCE OF THE EFFECTIVE DATE OF THE CHANGE (UNLESS THAT IS NOT PRACTICABLE, IN WHICH CASE THE UPDATED NOTICE MUST BE GIVEN AS SOON AS REASONABLY PRACTICABLE): We are giving you this updated notice because the information in Item __ has changed, as shown below, effective [DATE].]

IMPORTANT

Most or all of the information in this notice is available to you by other means, such as from the third-party websites listed in the Appendix at the end of this notice. We have not independently verified the third-party information we are relaying in this notice.

In addition, nothing in this notice is intended to act as a substitute for investment, fee and expense information that is available elsewhere, such as in the summary plan description and the prospectuses and other information that is available from the third party websites listed in the Appendix. Before investing, you should review all information that is available to you and not rely only on the information contained in this notice.

In choosing investments, remember that

- Past performance is not necessarily an indication of how investments will perform in the future.
- A well-balanced, diversified investment portfolio is best for most plan participants.
- Fees and expenses are only one of several factors that you should consider when making investment decisions. For example, a higher-cost investment may perform better than a lower-cost investment even after taking costs into account. Nevertheless, the cumulative effect of fees and expenses can substantially reduce the growth of your Plan account. For more information and an example demonstrating the long-term effect of fees and expenses, see http://www.dol.gov/ebsa/publications/undrstndgrtrmnt.html.

References below to "Funds" are to the investment funds and annuities the Plan provides as investment options, as listed in the Appendix to this notice.

For a glossary of investment terms, see http://moneychimp.com/glossary/ or http://www.investopedia.com/dictionary/.

The remainder of this notice describes important information regarding the Plan's investments and fees. Additional important information appears in the Appendix attached to this notice.

1. **Explanation of the circumstances under which participants and beneficiaries may give investment instructions:** [INSERT DESCRIPTION; THE REGULATIONS DO NOT SAY HOW DETAILED THIS OR OTHER DESCRIPTIONS MUST BE].

2. **Explanation of any limitations on instructions described in Item 1, including any restrictions on transfers to or from a Fund:** [INSERT DESCRIPTION OF ANY RESTRICTION OR LIMITATION THAT MAY BE APPLICABLE TO A PURCHASE, TRANSFER, OR WITHDRAWAL OF THE INVESTMENT IN WHOLE OR IN PART (SUCH AS ROUND TRIP, EQUITY WASH, OR OTHER RESTRICTIONS)].

3. **Description of or reference to Plan provisions relating to the exercise of voting, tender and similar rights as to Funds, as well as any restrictions on such rights:** [INSERT DESCRIPTION]. If we receive materials relating to the exercise of voting rights etc. that are passed through to you, we presently intend to provide them to you.

4. **Funds offered under the Plan:** See the Appendix for a list of Funds and investment and expense information about them.

5. **Identification of investment managers offered as an investment option under the Plan:** [INSERT DESCRIPTION IF APPLICABLE; OTHERWISE DELETE THIS QUESTION OR SAY "NOT AVAILABLE UNDER THE PLAN"].

6. **Description of any "brokerage windows," "self-directed brokerage accounts," or similar arrangements that enable participants and beneficiaries to select investments beyond those described in Items 4 and 5:** [INSERT DESCRIPTION IF APPLICABLE; OTHERWISE DELETE THIS QUESTION OR SAY "NOT AVAILABLE UNDER THE PLAN"].

7. **Explanation of any fees and expenses for general Plan administrative services (e.g., legal, accounting, recordkeeping), which may be charged against the individual accounts of participants and beneficiaries and are not reflected in the total annual operating expenses of Funds, as well as the basis on which such charges will be allocated (e.g., pro rata, per capita) to, or affect the balance of, each individual account:** [INSERT DESCRIPTION]

8. **Explanation of any fees and expenses that may be charged against your individual account on an individual, rather than on a Plan-wide basis (e.g., QDRO fees, loan fees, redemption, load or similar fees, commissions), and that are not reflected in the total annual operating expenses of any Fund:** [INSERT DESCRIPTION]

9. **Information available on request:** Please go to the websites and other sources of information listed in the Appendix to obtain: [EDIT OUT ANY INAPPLICABLE ITEM]

   - Copies of Fund prospectuses (or, alternatively, any short-form or summary prospectus, the form of which has been approved by the Securities and Exchange Commission) or similar documents for Funds that are not federally registered.
   - Copies of any financial statements or reports, such as statements of additional information and shareholder reports, and of any other similar materials relating to the Plan's Funds, to the extent such materials are provided to the Plan.
   - A statement of the value of a share or unit of each Fund as well as the date of the valuation.
   - A list of the "plan assets," if any, comprising the portfolio of each Fund, and the value of each such asset (or the proportion of the investment which it comprises).

If you need assistance in obtaining any of these, contact _____ at [ADDRESS, E-MAIL ADDRESS, TELEPHONE NUMBER].

Appendix[2]

[NAME OF PLAN]

Investment Funds [3]– [DATE]

Whether you will have adequate savings at retirement will depend in large part on how much you choose to save and how you invest your savings. The following information will assist you in comparing the Funds available to you under the [NAME OF PLAN].

While the information furnished below is important to making informed investment decisions, as we cautioned you in the notice to which this Appendix is attached, you should carefully review all available information about an investment option prior to investing your retirement savings in it. Internet website addresses are provided to help you access additional information (such as investment strategies and risks, portfolio holdings, and turnover) about each of the Plan's Funds. You may also contact your Plan representative, [INSERT NAME OF FIDUCIARY OR DESIGNEE] at [INSERT TELEPHONE NUMBER AND ADDRESS] for additional information or visit the Department of Labor's website for general information [4]on investing for retirement. See www.dol.gov/ebsa/investing.html.

This Appendix has these 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 IV explains how you can get more information.

Part I. Performance Information

This chart focuses on the performance of Funds that do not have a fixed or stated rate of return. This chart shows each Fund's performance over several time periods and compares the performance with a recognized benchmark. For options with returns that vary over time, past performance does not guarantee how your investment in the option will perform in the future. Your investments could lose money. Risk information is available on the Funds' websites indicated below.

Variable Return Investments		
Name/Type of Fund/Website/More Information[5]	**Average Annual Total Return as of [DATE]**[6] **1yr. 5yr. 10yr.**	**Benchmark/Index**[7]**as of [DATE]** **1yr. 5yr. 10yr.**
Equity Funds		
A. [NAME/TYPE] [WEBSITE] [INFORMATION SOURCE]	% % %	% % % [NAME, E.G., S&P 500]
B. [NAME/TYPE] [WEBSITE] [INFORMATION SOURCE]	% % %	% % % [NAME, E.G., Russell Midcap]
C. [NAME/EMPLOYER STOCK] [WEBSITE] [INFORMATION SOURCE]	% % %	% % % [NAME, E.G., S&P 500]
Bond Funds		

Variable Return Investments		
Name/Type of Fund/Website/More Information[5]	**Average Annual Total Return as of [Date]** **1yr. 5yr. 10yr.**	**Benchmark/Index[7] as of [DATE]** **1yr. 5yr. 10yr.**
D. [NAME/TYPE] [WEBSITE [INFORMATION SOURCE]	% % %	% % % [NAME, E.G., Barclay US AGGR. BD.]
Other		
E. [NAME/TYPE] [WEBSITE] [INFORMATION SOURCE]	% % %	% % [NAME, E.G., Generations 2020 Composite Index]

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

Fixed or Stated Return Investments			
Name/Type of Fund	**Return**	**Term**	**Other[8]**
[NAME/[DESCRIBE E.G., STABLE VALUE FUND] [WEBSITE] [INFORMATION SOURCE]			[DESCRIBE]

Part II. Fees and Expense Information

This chart shows only investment-related fees and expenses. Fees and expenses are only some of many factors to consider when you decide to invest in a Fund. You may also want to think about whether an investment in a particular Fund, along with your other investments, will help you achieve your financial goals.

Name/Type of Fund	Total Annual Operating Expenses* As a % and Per $1000 Investment[9]	Shareholder/Shareholder-Type Fees**/Investment Restrictions[10]
Equity Funds		
A FUND/[DESCRIBE, E.G., S&P 500 INDEX]	0.__%/$	[DESCRIBE]
Bond Funds		
B FUND/[DESCRIBE]	0.__%/$	[DESCRIBE]
Other		
C. FUND/[DESCRIBE]	0.__%/$	[DESCRIBE]

For an explanation of non-investment-related fees and expenses, such as recordkeeping or loan processing fees that may be charged against your account, you may consult the Plan's SPD, the notice to which this Appendix is attached, and your quarterly benefit statement. The dollar amount actually charged to your account during the preceding quarter for such administrative or individual expenses will be reported to you on a quarterly basis.

Note: More current information about Plan Funds, including fees and expenses and performance updates, may be available at the listed Internet website addresses.

* Total Annual Operating Expenses are ongoing expenses paid indirectly from your investment in this Fund each year, expressed as a percentage of the value of your investment in the Fund (e.g., expense ratio) and a dollar amount per $1000 of investment.

** Shareholder/Shareholder-type Fees are fees paid directly from your investment in this Fund (e.g., sales loads, sales charges, deferred sales charges, redemption fees, exchange fees, account fees, purchase fees, transfer or withdrawal fees, surrender charges, contract maintenance fees, and mortality and expense charges).

Part III. Annuity Information

This chart 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.

Name/Type of Fund	**Objectives/Goals**	**Pricing Factors**	**Restrictions/Fees[11]**
[NAME OF FUND] [WEBSITE] [INFORMATION SOURCE]	[E.g., to provide a stream of fixed income payment for life]	[E.g., age, interest, rates and form of distribution]	

Part IV. Getting More Information[12]

The websites in the chart generally will provide you the following additional information about each Fund [including, to the extent applicable, the employer stock fund].[13] [To the extent they do not provide you this information, you may get it from [WEBSITE OR WEBSITES].]:

- The Fund's issuer.
- The Fund's objectives or goals.[14]
- For any Fund other than a fixed-return investment, its principal strategies.[15]
- For any Fund other than a fixed-return investment, its portfolio turnover rate.[16]
- Its updated performance, fee, and expense data, as shown on this Appendix.[17]

To get a free paper copy of the just listed website information, contact _____ at _____.

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Government-Required
Quarterly Statement Information

Include the following individualized information in each participant's quarterly statements:

1. (a) The dollar amount of the following **plan-wide administrative fees and expenses** actually charged to the account (whether by liquidating shares or deducting dollars) during the preceding quarter, and (b) a description of the services to which the charges relate: fees and expenses for general Plan administrative services (e.g., legal, accounting, recordkeeping), which may be charged against the individual accounts of participants and beneficiaries and are not reflected in the total annual operating expenses of Funds. DISCUSS
2. [IF APPLICABLE, INCLUDE THE FOLLOWING STATEMENT: In addition to the individual fees and expenses listed in this statement, some of the Plan's administrative expenses for the preceding quarter were paid directly or indirectly by one or more of the Plan's Funds (e.g., through revenue sharing payments, Rule 12b-1 fees, or sub-transfer agent fees).]
3. (a) The dollar amount of the following **earmarked fees and expenses** actually charged (whether by liquidating shares or deducting dollars) during the preceding quarter to the account, and (b) a description of the services to which the charges relate: fees and expenses charged against the individual account on an individual, rather than on a Plan-wide basis, and that are not reflected in the total annual operating expenses of any Fund.

We also strongly recommend including an appropriate disclaimer, such as: **Although we have done our best to make sure that the information in this statement is correct, <u>you should not rely on anything in this statement in making investment decisions</u>. Instead, you must independently investigate any material point on which you might rely. Please review your statement carefully. Every effort is made to assure the accuracy of this information. However if you believe an error has been made, you should notify [name] within 30 days.**

Endnotes
[DELETE FROM FINAL FORM]

[1] Paul Hastings LLP hereby authorizes any employer to use the model package in connection with the defined contribution plans it sponsors for its own employees. The use of this model package for commercial purposes or by institutions or individuals in the course of their business of administering benefit plans, or assisting their clients or customers to administer defined contribution plans, is hereby forbidden without the express written approval of Paul Hastings LLP.

This model package is intended only as a starting point for the development of a plan-specific notice. A Word version of its most recent iteration is available at http://www.paulhastings.com/assets/news/ModelFeeandExpenseDisclosureNotice.DOC.

We have tried to adequately deal with all of the Department of Labor's disclosure requirements in every respect, but any plan sponsor using our form needs to independently verify that the notices it develops from our model package actually do meet all the new requirements.

We recommend revising existing investment information disclosures to be consistent with and refer to the initial/annual notice, and to include an Internet link to it.

Before distributing notices created using this package, be sure to delete all editorial comments and instructions, such as all endnotes and bracketed comments.

[2] This chart is based on the chart the Department of Labor provided in 29 C.F.R. § 2550.404a-5 as a safe harbor format for complying with 29 C.F.R. § 2550.404a-5(d)(2). It is not a safe harbor for any other disclosure requirement. We have revised the chart to provide other required disclosures not provided in our model notice form or to be included in quarterly statements. We have made other minor, nonsubstantive changes. **Edit the chart as appropriate.**

[3] Include all options other than open-ended self-directed accounts.

[4] Part III should be omitted if the plan does not offer annuities.

[5] This is optional, but it may minimize information/assistance demands on the Plan administrator.

[6] Except as to certain employer stock, 29 C.F.R. § 2550.404a-5(h)(3) defines this as the average annual compounded rate of return that would equate an initial investment in a designated investment alternative to the ending redeemable value of that investment calculated with the before tax methods of computation prescribed in Securities and Exchange Commission Form N-1A, N-3, or N-4, as appropriate, except that such method of computation may exclude any front-end, deferred or other sales loads that are waived for the participants and beneficiaries of the covered individual account plan. The 1-, 5- and 10- year periods are for periods ending the preceding calendar year. If the Fund has been in existence less than, e.g, 10-year calendar year periods, provide the return for the life of the Fund.

For employer stock that is publicly traded on a national exchange or generally recognized market, in which participants invest on an earmarked basis (i.e., not through a unitized fund), 29 C.F.R. § 2550.404a-5(i)(1)(vi)(B) defines it as

> the change in value of an investment in one share of stock on an annualized basis over a specified period, calculated by taking the sum of the dividends paid during the measurement period, assuming reinvestment, plus the difference between the stock price (consistent with ERISA section 3(18)) at the end and at the beginning of the measurement period, and dividing by the stock price at the beginning of the measurement period; reinvestment of dividends is assumed to be in stock at market prices at approximately the same time actual dividends are paid.

For employer stock that is not publicly traded on a national exchange or generally recognized market, in which participants invest on an earmarked basis (i.e., not through a unitized fund), 29 C.F.R. § 2550.404a-5(i)(1)(vi)(C) defines it as just set forth, except that "changes in value shall be calculated using principles similar to those set forth in [the just quoted definition]."

[7] The index must not be administered by an affiliate of the investment issuer, its investment adviser, or a principal underwriter, unless the index is widely recognized and used.

[8] If the issuer reserves the right to adjust the fixed or stated rate of return prospectively during the term of the contract or agreement, include the current rate of return, the minimum rate guaranteed under the contract, if any, and a statement advising participants and beneficiaries that the issuer may adjust the rate of return prospectively and how to obtain (e.g., telephone or website) the most recent rate of return.

[9] Insert the total annual operating expenses of the investment for a one-year period expressed as a percentage (i.e., expense ratio) calculated in accordance with 29 C.F.R. 2550.404a-5(h)(5) and expressed as a dollar amount for a $1,000 investment (assuming no returns and based on the percentage described in 29 C.F.R. § 2550.404a-5(d)(1)(iv)(A)(2)). These expense disclosures are not required as to employer stock investments unless they are effected through a unitized fund, nor are they required as to fixed return investments.

[10] If applicable, describe any restriction or limitation on purchases, transfers, or withdrawals, such as round trip or equity wash requirements.

[11] Describe any limitations on the ability of a participant to withdraw or transfer amounts from the annuity option and any fees applicable to such withdraws/transfers, as well as any fees that will reduce the value of amounts allocated to the annuity option, such as surrender charges or market value adjustments.

[12] If annuities are an option, revise this section to state that the following information is available at the designated website: (a) name of issuer and contract, fund, or product; (b) description of its objectives and goals; (c) description of the option's distribution alternatives/guaranteed income payments (e.g., payments for life, payments for a specified term, joint and survivor payments, optional rider payments), including any limitations on the right of a participant or beneficiary to receive such payments; (d) description of costs and/or factors taken into account in determining the price of benefits under an option's distribution alternatives/guaranteed income payments (e.g., age, interest rates, other annuitization assumptions); (e) description of any limitations on the right of a participant or beneficiary to withdraw or transfer amounts allocated to the option and any fees or charges applicable to a withdrawal or transfer; and (f) description of any fees that will reduce the value of amounts allocated by participants or beneficiaries to the option (e.g., surrender charges, market value adjustments, administrative fees).

[13] For employer stock funds that provide earmarked direct investment in employer stock (i.e., for other than unitized funds), none of this information need be provided except for the name of the issuer and the performance data referenced in the last bullet point.

[14] This must be set forth in a manner consistent with Securities and Exchange Commission Form N-1A or N-3, as appropriate (or, as to fixed-return investment, the objectives and goals (e.g., to provide stability of principal and guarantee a minimum rate of return)).

[15] This must include a general description of the types of assets held by the Fund and principal risks in a manner consistent with Securities and Exchange Commission Form N-1A or N-3, as appropriate.

[16] This must be calculated in a manner consistent with Securities and Exchange Commission Form N-1A or N-3, as appropriate.

[17] The information must be updated on at least a quarterly basis, or more frequently if required by laws other than ERISA.