REISH LUFTMAN REICHER & COHEN
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

REPORT TO
PLAN SPONSORS

A newsletter for improving the design and operation of plans

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Message From The Firm

Greater opportunities create greater responsibilities. The 401(k) marketplace is changing rapidly. The new investments for accumulation of benefits, like target date funds, are rapidly gaining widespread acceptance, and that trend is accelerated by the Pension Protection Act's fiduciary safe harbor for Qualified Default Investment Alternatives ("QDIAs"). New distribution investments are being created by mutual funds and insurance companies. The insurance companies are offering guaranteed lifetime amounts for retiring participants, while the mutual fund companies are targeting a desired level of annual distributions, but which are not guaranteed for life.

The new Schedule C to the Form 5500 will require greater reporting by large plans of fees and revenue sharing, beginning in 2009. The proposed 408(b)(2) regulation will support plan sponsors by requiring that most service providers give sponsors the information they need to understand and evaluate the direct and indirect revenues of those service providers and to evaluate the conflicts of interests involved in the provider's services or products.

Automatic enrollment has been widely embraced by large plans, and is experiencing widespread acceptance by mid-sized plan sponsors. While the take-up rate is lower for small plans, we are seeing increased activity in that market segment also.

And, 403(b) plan sponsors—particularly in the private sector—are feeling increased pressure to prudently evaluate their investments and expenses, as well as to satisfy the new documentation and compliance requirements beginning in 2009.

We are being hired to work on projects in all of these areas. Most interestingly, many of the projects are coming from advisers and providers in preparing for the changes in services and disclosures related to these matters. We believe that, beginning late this year and early next

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Future DOL Guidance

By Fred Reish (FredReish@Reish.com)

The DOL has said that we can expect two new pieces of guidance in the near future. Both will impact how plans are operated and, more particularly, may affect participant investment decisions. Once that guidance is final, plan sponsors will be required to provide participants with specified investment information and may offer participants new investment advisory services.

The first proposal will pave the way for fiduciary investment advice for participants. The Pension Protection Act ("PPA") created the concept of a "fiduciary adviser" for participants. The purpose was to increase the use of investment advisory services for participants. That objective will be accomplished through an exception to the prohibited transaction rules which would allow potentially conflicted advice by broker-dealers and by plan providers (*e.g.*, recordkeepers that are affiliated with a mutual fund management company). The advice would be considered to be "potentially conflicted" because, in both cases, the provider of the advice, or an affiliate, could end up with increased revenues if the advice favored investments or services that paid money to the adviser or an affiliate (for example, investment management fees or commissions).

The PPA will permit advice under those potentially conflicted circumstances if certain safeguards are followed. The purpose of the new guidance is to provide additional details on the safeguards.

On May 30th, the DOL forwarded its proposal to the Office of Management and Budget ("OMB") for review and approval. The OMB has up to 90 days to act on the proposal. Most likely, the OMB will complete its process before that deadline and, as a result, the proposed regulation could be released to the public as early as 30 to 45 days from now.

The second proposal is a regulatory definition of the information that must be provided to participants concerning plan fees. As background, there is virtually no requirement in the law that participants be told anything about plan fees. (While ERISA does not have any fee disclosure requirements for participants, plans that invest directly in mutual funds must provide prospectuses to the participants who invest in those funds.) However, as a practical matter, most plan sponsors and providers give participants information about, at the least, the expense ratios of the investments offered by the plan.

Consistent with the current focus on fees and expenses—including the class action litigation which concerns, among other things, the information that should be provided to participants, the DOL is providing guidance in this area. (With the advantage of hindsight, it seems

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Every Company's Retirement Plan Must be Amended this Year

By Marty Heming (MartyHeming@Reish.com)

Every retirement plan, including pension, profit sharing and 401(k) plans, regardless of whether the plan is a prototype, volume submitter, or individually drafted, must be amended to comply with the final Internal Revenue Code ("Code") Section 415 regulations issued by the IRS. Code Section 415 restricts (i) the amount of the employer contribution that may be allocated to a single participant in a defined contribution plan, or (ii) the amount of the annual benefit that may be paid to a participant in a defined benefit plan.

The 415 final regulations affect more than the maximum limits on the benefits or allocations for a participant. This is true—as a practical matter—because the definition of compensation for the purposed Code Section 415 is likely to be the same as the definition of compensation for other purposes, such as allocations of contributions or determining benefits.

If a plan document is not amended before the deadline, it will be subject to disqualification by the IRS. Generally, the deadline is the last day for filing the corporate tax return for the plan year commencing on or after July 1, 2007. For example, if the plan year is used to measure the Code Section 415 limitation, and the plan year is the calendar year, then the deadline is the filing of the corporate tax return for the 2008 calendar year.

Despite this general rule, the deadline may be earlier in 2008 depending on how the plan is written. This means that, if your company has a qualified retirement plan, it should be amended in the near future to avoid qualification problems.

If the plan is a prototype, the sponsor of the prototype will supply the company with an amendment to be signed. If you have an individually drafted plan, such as cash balance or employee stock ownership plan, then you must hire an attorney or other advisor to create the amendment. ❖

What 408(b)(2) Means to Plan Sponsors

By Fred Reish (FredReish@Reish.com)

Beginning next year, plan sponsors will be given more information about:

- the revenues received by their plan's service providers (such as recordkeepers and investment consultants), and particularly about the indirect payments those service providers receive from the plan's investments and investment providers; and
- the potential conflicts of interest that those service providers have, as well as any procedures they have in place to protect plans against those conflicts.

While ERISA—through its fiduciary responsibility rules—has always contemplated that plan sponsors and their representatives, such as committee members, were investigating and evaluating those issues, the fact is that, in many cases (or perhaps in most cases), plan sponsors did not know about the indirect payments or the conflicts of interest. As a result, some of the new information may be surprising . . . or even disturbing . . . to plan sponsors.

Regardless of whether the disclosures present new or surprising information to plan sponsors, it is clear that they will be required to review that information and to evaluate it. Correspondingly, it also seems obvious that there will be greater focus on whether plan sponsors are actually fulfilling those tasks. In other words, even though the laws regarding fiduciary responsibilities have not changed, we believe that the actual application of those laws will demand more from plan sponsors. At the least, it will demand that they be attentive to the information they receive.

As a result, plan sponsors are forewarned to (i) review and evaluate the information they receive, (ii) seek outside help if they do not have the internal capabilities to properly evaluate and benchmark the new information; and (iii) meet as a plan committee and discuss the information (or, if you do not have a plan committee, to set one up).

It also seems obvious that this area will be ripe for fiduciary litigation. However, that risk can be avoided by taking the time and energy to evaluate the information received. We believe that most plan sponsors will fall into one of two categories: the "low-hanging fruit" category, which is made up of plan sponsors who do nothing; and the "attentive fiduciary" category, which is made up of plan sponsors who read, discuss, and evaluate the information received. There can be no doubt about which group is at risk. ❖

File the Form 5500 or Else the DOL Will "Remind" You

By Heather Bader-Abrigo (HeatherAbrigo@Reish.com)

This year alone, the Department of Justice has obtained two guilty pleas for criminal charges for failure to file the Form 5500. On February 27, 2008, a former owner of a Manhattan-based company plead guilty to failing to file a tax return for an ERISA employee benefit plan. As part of the plea agreement, the owner agreed to pay restitution of $30,693.06 within one year. He is currently awaiting sentencing for which he faces a minimum of one year in prison. On April 8, 2008, the President of a North Carolina construction company was sentenced to a one year term of federal probation and ordered to pay $138,478.80 in restitution, a $5,000 fine, and up to $10,000 for successor trustee administrative fees for making a false statement on the profit sharing plan's Form 5500 [*see*, http://www.reish.com/practice_areas/empbenefits.cfm].

The failure to file or to accurately file a Form 5500 for your retirement plan has several consequences. Here we address two issues that you should be aware of: (i) what happens if you do not file the Form 5500; and (ii) what you can do now.

What happens if you do not file the form 5500 or fail to file an accurate form 5500?

The Internal Revenue Service ("IRS") can impose penalties of $25 per day, up to a maximum of $15,000, for failure of a pension plan to file a Form 5500 or a Form 5500-EZ. However, the Department of Labor's ("DOL") penalties are different and can be much larger. The DOL penalties can reach amounts of up to $1,100 per day, with no maximum, for failure to file a Form 5500. These penalties are applied to pension, welfare and/or welfare/fringe benefit plans, excluding plans that file the Form 5500-EZ.

For willful violations, and as the owner and President of the construction company found, courts have the discretion to impose severe criminal penalties (up to $500,000 for corporations) and even imprisonment. This discretion is based on the facts and circumstances. Realistically, most of the cases also involve egregious facts, such as embezzlement of plan money.

What can you do now?

Before the DOL or the IRS contacts you, file your delinquent annual reports immediately. Under the DOL's Delinquent Filer Voluntary Correction ("DFVC") program, you can file delinquent Forms 5500 and pay a reduced civil penalty. Information about the DFVC program can be found at the DOL's website at: http://www.dol.gov/ebsa/FAQs/faq_DFVC.html.

In short, don't treat the filing of the Form 5500 lightly . . . the consequences can be dire. ❖

Message from the Firm

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year, these issues will demand more attention from plan sponsors. But, based on the work being done by advisers and providers, we believe that plan sponsors will be given considerable support by the quality service providers in the 401(k) market. Nonetheless, the changes require that plan sponsors be attentive to the new opportunities for their plans, to the services being offered to improve their plans, and to the information on revenues and conflicts that will be given to them. As a result, the rapid pace of change will require that plan sponsors be more attentive. As a part of that, we believe that more plan sponsors will be turning to advisers and consultants who specialize in the 401(k) marketplace.

Most of the articles in this newsletter were written to educate you, as plan sponsors, about the issues mentioned in this introduction. We hope that the information will be helpful to you.

-Fred Reish

Guidance

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remarkable that the DOL is just now getting around to addressing that issue in an authoritative way.) In addition, several Congressional committees are considering the information that should be disclosed to participants on fees and expenses and a bill on that subject has been approved by the House Education and Labor Committee.

We understand that the disclosure requirements will be in the form of a proposed regulation under the fiduciary rules in 404(a) of ERISA. In the past, there have been some disclosure standards under 404(c) of ERISA, but plan fiduciaries were not required to comply with those provisions. Instead, 404(c) offers a fiduciary "safe harbor" if a plan complies. However, the new rules will be mandatory, which means that plan sponsors will have to provide the required information to participants—and, therefore, that providers will have to assist in that process.

At this point, there is no reason to believe that either of the proposals will contain controversial provisions. In fact, we believe that many plan sponsors and most of the major providers are already providing the information that will be required. However, we suspect that "the devil will be in the details." That is, we suspect that some of the specific provisions may be objectionable to some plan sponsors and some providers. But, that remains to be seen.

When you combine those two new proposals with the finalization of the disclosure rules under ERISA section 408(b)(2), the second half of this year promises to be, as they say, "interesting." ❖

Re-Enrolling: Doing Well While Doing Good

By Fred Reish (FredReish@Reish.com)

We have recently decided to "re-enroll" our law firm's 401(k) plan. The purpose is to improve the investing by the participants. A side benefit is fiduciary protection for the plan committee and the law corporation. In a sense, the change will do good for participants—they will be better invested, while it will do well for the fiduciaries—because of the legal protections.

What is re-enrollment . . . and why does it work that way?

The DOL's regulation for qualified default investment alternatives, or QDIAs, provides a fiduciary "safe harbor" where defaulted participants are placed in certain types of investments. (A default occurs where a participant is given the opportunity to direct his investments, but fails to do so.) There are only three kinds of long-term QDIAs. Those are: age-based funds and models; risk-based funds and models; and managed accounts. The most common use of those QDIAs are for defaults by new participants . . . for either regularly enrolled plans or automatically enrolled plans. However, QDIAs are not limited to those uses.

We have carefully evaluated the QDIA rules and, based on our analysis (as well as comments made by DOL officials), we have determined that a plan can be re-enrolled and the QDIA protections can be obtained for participants who default on the re-enrollment.

By "re-enrollment," we mean that the plan fiduciaries can, in effect, re-start the plan from an investment perspective. To do that, the plan would provide a notice to participants (of at least 30 days) that they will be required to direct their investments by a specified deadline. Participants would also be given the information required by the QDIA regulation, including information about the default investments and other plan investments. At the end of the period, the participants who had not re-directed their investments would be defaulted into a QDIA, for example, an age-appropriate target date fund. (Of course, the same protections would apply for risk-based funds and managed accounts.)

Why would a plan sponsor want to do that? In a nutshell, to improve the way that participants are investing . . . and to obtain the fiduciary protections (the so-called "safe harbor") that the QDIA rules offer.

To put this in perspective, many, if not most, 401(k) plans were adopted before target date funds, life-style funds and managed accounts were popular. As a result, many long-term participants did not have an opportunity to select those funds when they initially entered their plans. While one could argue that existing participants had that opportunity when the new funds or services were added to the plan, there is a considerable amount of evidence that, once participants have made their initial elections, they make few, if any, changes—the so-called inertia effect. As a result, a re-enrollment process will cause participants to re-visit their investment preferences and their objectives and to consider whether to accept the default into "portfolio investments," that is, into QDIAs.

In addition to improving participant investing (and there is clear evidence that QDIA-type investments do improve participant investing), the fiduciaries also receive considerable protection if they follow the default process outlined in the DOL regulation. Of course, that begs the question of why do fiduciaries need protection. There are two answers to that question. First, for default investments, fiduciaries have always been on the hook. Secondly, for participant-directed investments, fiduciaries are only protected from imprudent participant investments if their plan complies with the 20 to 25 requirements of 404(c). It is our experience that, while most plans intend to comply with 404(c), few take the steps needed to obtain that protection.

So, re-enrollment is truly a case of doing well while doing good. It improves the overall quality of the plan while simultaneously offering a high level of protection to fiduciaries. It doesn't get much better than that. ❖

IRS Audits

The IRS is focusing its audits on key issues that will both promote compliance and ensure that employees receive the benefits that they are entitled to. Among the issues of concern to the IRS is whether all eligible employees are being covered by the qualified plans—and whether they are being covered at the appropriate times.

Our experience is that these coverage issues fall primarily into three categories. Those are:

1. The inadvertent failure of plan sponsors to include employees in their plans, and especially in 401(k) plans.
2. The failure of plan sponsors to include certain classes of employees at the proper time. For example, when temporary or agency employees are converted to regular employees, they are entitled to be credited with their service as temporary or agency employees for all purposes, including eligibility, vesting and benefit accrual.
3. The failure to include employees who may be classified as fitting into excluded categories, but who are actually employees based on the criteria applied by the IRS and the courts. That includes both workers who are classified as independent contractors, but who are actually common law employees, and workers who are given special employment designations, but where those categories of employees are not excluded by the terms of the plan.

In addition, we also see cases where the documents provide that a plan covers all of the employees of the plan sponsor and any affiliate, but where the employees of the related organizations are not actually placed into the plan. That is a slightly different, but related, issue.

As a word of warning, plan sponsors should audit their internal operations to determine whether they fall into one of those four categories. If so, the practices should be changed and/or the plan documents should be amended, as appropriate. In addition, the past operations of the plan should be corrected by retroactively including those workers in the plan. The IRS has developed specific rules for how to correct those defects and for whether or not the correction needs to be filed with the IRS.

If you find that you have one of those problems, our advice is to work with your ERISA attorneys or benefits consultants to appropriately correct your plan, both retroactively and prospectively.

How Early Can We Send Out the Annual QDIA Notices?

By Stephanie Bennett (StephanieBennett@Reish.com)

We have written quite a bit on qualified default investment alternatives, or QDIAs, in the past several months. Although many plan sponsors have selected a QDIA for their plans, that is not enough to obtain the protection afforded to QDIA investments. Remember that, in order to comply with the Department of Labor ("DOL") guidance and obtain the fiduciary protection, plan sponsors (or someone else appointed by the plan sponsor) must meet the disclosure requirements. Those disclosure requirements include both initial and annual notices. In our experience, this is the one area where many plan sponsors may drop the ball. That is, they may fail to provide the notice at all, or fail to provide it timely.

Department of Labor rules govern the timing of QDIA notices. The annual notices must be delivered within a *reasonable* period of time, but no later than 30 days before the beginning of the plan year. The DOL rules provide guidance on the latest time the notices can be sent (30 days). However, many plan sponsors want to know when is the earliest date that the annual notices can be provided? In other words, what is a *reasonable* period of time for sending out the annual notices?

The DOL recently issued guidance indicating that annual QDIA notices can be delivered as early as 90 days before the beginning of a plan year. In that guidance, the DOL considered whether the timing requirements for notices required by IRS rules for certain automatically enrolled plans are the same as the timing requirements for QDIA notices. The DOL indicated that since the notices required by the IRS for automatically enrolled plans can be combined with QDIA notices, a plan with both can deliver the combined notice as early as 90 days before the beginning of the plan year or 90 days before initial eligibility. In doing that, the plan will satisfy both the automatic enrollment notice requirement and the QDIA notice requirement.

Based on that guidance, we have concluded that plans can rely on the 90-day period for purposes of providing the annual QDIA notices, even if the plan does not include automatic enrollment. However, that does not mean that 90 days is the outer limit for furnishing the annual notice. I mention this because the DOL timing rule is one of reasonableness, and the DOL did not indicate that anything over 90 days for purposes of notice delivery was unreasonable. Of course, the safe bet is to use 90-days as an outer limit, since DOL guidance specifically indicates that a notice delivered as early as 90 days will satisfy its timing rules.

All that said, a quarterly process for delivering annual notices before the beginning of the plan year should meet the DOL timing rules. ❖

PLANSPONSOR's 15 Legends of the Retirement Industry

In our last edition of our *Plan Sponsors* newsletter (http://www.reish.com/publications/pdf/plansponsorfeb08.pdf), we congratulated Fred Reish for being one of the 15 individuals selected as "Legends of the Retirement Industry." In this newsletter and in future newsletters, we will be featuring the other Legends that were also selected by *PLANSPONSOR*. These 15 "Legends" are individuals who have in the past decade and a half, made a lasting contribution to the nation's retirement security.

Congratulations to Dr. Shlomo Benartzi, Professor and Co-Chair of the Behavior Decision Making Group at the Anderson School of Management at UCLA for "his invaluable contributions to our understanding of participant behaviors, while at the same time providing solutions to the challenges of non-participation and inadequate deferrals that can undermine our voluntary savings system."

Academic Studies on Participant Behavior

As a part of our support for academic research concerning participant investment behavior (including our support of research by Professor Shlomo Benartzi of UCLA), we regularly post important academic and industry studies on our website.

We have recent posted a study entitled "Participant Reaction and The Performance of Funds Offered by 401(k) Plans" by Edwin J. Elton, New York University, Martin J. Gruber, New York University, and Christopher R. Blake, Fordham University.

This study concludes that, on average, 401(k) fiduciaries select investments that out-perform randomly selected funds of the same type. However, the study goes on to conclude that, when 401(k) fiduciaries change the investments offered by their plans, they choose funds that did well in the past, but after the change, the removed funds do better than the added funds. In other words, 401(k) fiduciaries may be removing reasonably good-quality mutual funds after they have gone through a period of under-performance, but as they are ready to return to out-performance. The study also has conclusions about participant reactions to past performance.

To view or print a copy of the study, visit our web site at http://www.reish.com/publications/pdf/perfoffunds.pdf.

Responding to *LaRue*

By Bruce Ashton (BruceAshton@Reish.com)

You've probably read a lot about the Supreme Court's *LaRue* decision—much of it predicting that the case reflects the end of life as we know it. In that decision, the Court said that participants in 401(k) plans have the right to bring a lawsuit against fiduciaries for losses in their individual accounts. (For additional information about this case and our comments on it, see http://www.reish.com/publications/pdf/larue.pdf.)

The case arose out the alleged failure of the plan administrator—*i.e.*, the employer—to follow a participant's directions regarding the investment of his account. As a result, the participant claims that he lost money, presumably on the basis that he would have had a bigger return if his instructions had been followed. What is somewhat unusual about the allegations in the case—which have not yet been proven at a trial—is that in our experience, the plan administrator is almost never involved in the process of implementing participant investment instructions. Rather, this task is left to the plan recordkeeper.

So what does this have to do with service provider agreements? Just this: the plan sponsor needs to consider whether it will accept the ultimate responsibility for participant directions or whether, in the context of the overall services the plan receives, it expects a service provider to accept both the responsibility and accountability for this function. If the latter, then the sponsor needs to make sure that the agreement adequately addresses the issue by specifying that the service provider is responsible for implementing participant instructions. As a part of this, the sponsor may expect the service provider to agree in the contract that it will correct any errors as soon as they are discovered and that it will indemnify the plan sponsor and fiduciaries if the directions are not followed.

If the plan sponsor negotiates to have the service provider accept this responsibility, there is one other provision that should be addressed, but may be overlooked. Often, service provider agreements indicate that unless the plan sponsor or fiduciaries object to a report provided to them by the service provider within a specified period—often within 60 to 90 days—the report is deemed accepted and the service provider is no longer responsible for any errors that may be reflected in the report. In the context of participant investment instructions, the plan sponsor may have little way to find out about a failure to properly implement participant investment instructions unless a participant complains. And the typical participant may not discover the error until he receives his next quarterly statement (assuming he discovers it then). Thus, the plan sponsor would want to object to the deemed approval provision and request that it be removed.

As we have previously written, we do not view *LaRue* as the end of the world. At the same time, plan sponsors may wish to take steps to protect themselves from the actual participant claim that lead to the decision so that the individual right to sue becomes irrelevant. ❖

2008 Southern California Rising Stars

Congratulations to Heather Bader-Abrigo, Stephanie Bennett and Debra Davis. They were selected for inclusion in the "2008 Southern California Rising Stars." The Super Lawyer's Rising Stars listing is published in the July issue of *Los Angeles* magazine and the stand-alone *Rising Stars* magazine.

CFDD 2008 ADVISOR CONFERENCE

Two of the firm's partners will be speaking at the CFDD 2008 Advisor Conference, October 12-15 in Scottsdale, Arizona. Fred Reish will be opening the Conference with a keynote presentation on "Plan Design and Emerging Trends." As one of the deepest thinkers on the future of 401(k) plans, Fred will focus on what plan service providers and fiduciaries should expect–and should be doing–to help participants achieve adequate retirement income. He will also make a keynote presentation on Monday, October 13, entitled "The Direction of 401(k) Plans: Shifting the Fiduciary Burden from Plan Sponsors to Providers & Advisors." Another forward-looking session, Fred will be examining how fiduciary decision-making may be made by advisors rather than plan sponsors in the future.

Bruce Ashton will be participating in two sessions on Wednesday, October 15. The first is entitled "Gap Analysis: Revenue Growth & Participant Success," and the second will focus on "Tips & Traps for Advisors Who Are Fiduciaries & Pursue Rollover Business."

The description of the second session highlights the controversy surrounding this issue:

> "Fiduciary advisors often provide additional services to participants, including rollover management services. This session will discuss the pitfalls, under both ERISA & tax qualification rules, for fiduciary advisors who pursue participant level business. We will specifically discuss whether or not a plan level fiduciary advisor who uses their position to encourage a rollover which is subsequently managed by the advisor and generates an additional or higher fee, is engaging in a prohibited transaction. The session will provide practical guidance and suggestions for avoiding legal traps. Operating structure, contracts, compensation, services, communication and documentation will all be discussed."

For further information, go to the conference home page at: http://www.thecfdd.com/CFDDconference2008.

Proposed Legislation on Fees and Expenses

The following discussion was prepared by the House Education and Labor Committee. It is intended to support the provisions included in The 401(k) Fair Disclosure for Retirement Security Act which was recently approved by he House Education and Labor Committee, by a vote that was largely along party lines, with the Democrats voting in favor of the disclosure proposal and with the Republicans voting against it. It appears that groups representing participants are in favor of this legislation, as are many advisers and commentators. On the other hand, it appears that the mutual fund industry and the broker-dealers are opposed to the legislation (which would, after all, require that they disclose more . . . thus placing the burden on them). Finally, my best reading is that the employer organizations, representing the business community, are largely neutral on the issue. Of course, there are exceptions to everything I just said, as these groups are not homogeneous.

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The 401(k) Fair Disclosure for Retirement Security Act Myths v. Facts

Myths v. Facts

Myth: Too much disclosure will confuse 401(k) participants.

Fact: H.R. 3185 would require service providers to disclose their fees in terms that are clear and easily understandable, so that plan participants can make sound investment decisions for themselves. The biggest problem facing workers with 401(k) plans is that there is too little disclosure of fees, not too much. Plan participants should be presented with the facts and then allowed to make their own decisions.

Myth: Fees on 401(k)s are already adequately disclosed.

Fact: There is no one place that 401(k) plan participants can go to find out about the fees they are paying. Information that is available is difficult to find and difficult to read. And some fees are simply not disclosed at all. As a result, a 2007 survey by the AARP found that roughly 80 percent of plan participants were not aware of fees they were paying on their 401(k)s.

Myth: More fee disclosure will dramatically increase costs to plan participants.

Fact: Most experts agree that while there may be a small initial cost involved with disclosing the fees that participants are charged, continuing to hide fees puts Americans' retirement security at risk. It is reasonable that large financial services firms should have to tell their customers how much they charge for their services. And giving the investing consumer better information will encourage greater competition among financial service providers and help reduce fees.

Myth: Actively managed investments provide better returns than index funds.

Fact: Over the full twenty year time period from 1983 to 2003, depending on the sector, index funds outperformed 89 percent to 97 percent of mutual funds. Index funds are not actively managed and therefore carry lower costs. While many 401(k) plans have made strides to include lower cost retirement options, index funds are still not available to workers in 30 percent of 401(k) plans.

Myth: Service providers that "bundle" their services will be required to unbundle them.

Fact: H.R. 3185 does not require service providers to unbundle their services. If a service provider sells investment management services, administrative services, and record keeping together as a package, it may continue to do so. H.R. 3185 simply requires service providers to disclose the costs of the components of its bundled products.

Myth: H.R. 3185 mandates one investment option for every 401(k) plan.

Fact: H.R. 3185 would simply require all 401(k) plans to offer at least one index fund. It does not limit other types of investment options that 401(k) plans may offer; it does not tell 401(k) plans which specific index funds they must offer; and it does not require plan participants to invest in index funds. It simply ensures that participants are able to invest in an index fund if they choose to do so.

Prepared by the House Education and Labor Committee ❖ April 2008 ❖ http://edlabor.house.gov

Around the Firm

Speeches: Fred Reish presented "Fee Disclosure and 408(b)(2) Burdens and Opportunities" at the National Retirement Partners Conference on May 2nd in Pebble Beach. On May 7th, Bruce Ashton presented "New DOL Regulations on Fee Disclosure: Why You Should Care" as a teleweb seminar for the National Tax Sheltered Accounts Association. At the Fiduciary360 National Conference, held in Charlotte, NC on May 8th-9th, Fred presented "Utilizing Prudent Practices," "The Regulation that is Going to 'Rock Our World'—the Impact of the DOL's New 408(b)(2) Regulation" and "Fiduciary Safe Harbor." On May 15th, Fred also presented "401(k) Plans: Top Issues Today…and Tomorrow" at the Oppenheimer Funds Third Party Administrator Conference in Wild Dunes, SC. On May 16th, Bruce presented "The Importance of Selecting the Right Plan Default Investment (How to Properly Select a QDIA)" at the Pension Focus Conference in Branson, MO.

Quote: In the May-June issue of *PlanAdviser* magazine, Fred was quoted in the article "A New Way to Pay."

Articles: Fred's column in the May issue of the *PLANSPONSOR* magazine addressed the topic of "Corporate Governance: ERISA-Style." Nick White wrote an article entitled "Are QDROs the Only Way a Divorcing Spouse Can Waive Pension Benefits?", published in the May issue of the *Pension Plan Fix-It Handbook*.

Any U.S. federal income tax advice contained in this communication (including any attachments) is neither intended nor written to be used, and cannot be used, to avoid penalties under the Internal Revenue Code or to promote, market or recommend to anyone a transaction or matter addressed herein.

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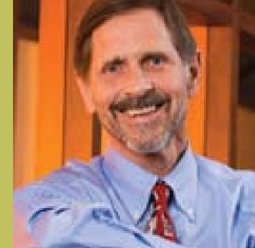
Just Out of Reish



Meeting Expectations

A plan committee's work is never done

I RECENTLY met with several plan committees to educate the members on their responsibilities as fiduciaries. I thought you might like to know some of the most commonly asked questions—and the answers.

How often should the committee meet?

The easy answer is: as often as is necessary. However, as a practical matter, plan committees tend to meet on a quarterly basis. In effect, there are three "event-driven" meetings and one "overview" meeting. By "event-driven," I mean that the focus of the non-annual meetings tends to be on specific issues (such as mutual fund manager changes), follow-up on current projects (such as automatic enrollment or watch-listed investments), changes in the law, and so on. The annual meeting should include a complete review of all of the investments and services.

What should be on the agenda?

Over the course of the year, all of the following items should be addressed at one meeting or another:

Investment Options. The major headings of an investment policy statement should be the agenda for the part of the meeting dealing with the investments, including the selection and monitoring of investment options, review of the plan's investment services (both plan- and participant-level investment advice), and review of the investment policy statement itself. These discussions also could include the addition of new asset classes (or investment categories) or new features (e.g., brokerage accounts, mutual fund windows).

Services. The services used by the plan should be monitored at least annually, including the plan-level investment consultant; compliance services (e.g., testing, 5500s, etc.); the recordkeeper; enrollment and investment education services; and, yes, the plan's attorney. The services should be reviewed for quality, effectiveness, and adherence to the governing agreements.

Fees and Expenses. This topic rapidly is becoming the No. 1 issue for consideration by plan committees—or, at least, it should be. The committee should focus on the reasonableness of the expenses and on understanding and evaluating all indirect revenues being paid to and from the plan's providers.

External Changes. This might include things like Roth deferrals, automatic enrollment, and qualified default investment alternatives (or QDIAs), as well as age-based lifecycle funds, education for participants, and so on.

Quality of Participant Investing. It is not well known that fiduciaries have significant responsibilities for the quality of participant investing. In fact, if a plan does not satisfy 404(c), fiduciaries are liable personally for imprudent participant investing. Fiduciaries also are responsible for monitoring the plan's enrollment services and investment education to determine, among other things, whether they are working.

Levels of Participation. Fiduciaries have a responsibility to implement a plan's eligibility provisions and to oversee the communications with their eligible employees. However, the scope of that duty is not well-defined. As a result, fiduciaries periodically should evaluate the plan's communication and enrollment services. That can be done by reviewing, among other things, data about the actual levels of participation and then comparing it with industry benchmarks supplied by the plan's advisers or providers.

Adequacy of Deferrals. This area is also largely unexplored. However, there is a duty for fiduciaries to select prudently and monitor their providers of participant education. Fiduciaries should solicit input from their advisers and providers about the available services to educate participants, about appropriate deferral rates, and should consider services to help participants increase their deferrals.

Some attorneys are concerned that minutes may be used against a committee. However, my experience is that, when properly prepared, minutes can be helpful in showing that a committee has engaged in a prudent process. The minutes, together with other materials reviewed by a plan committee, should be kept in a due diligence file for at least seven years. They should list the people attending the meeting, the items discussed, the materials reviewed, any input from advisers, and the decisions reached. In my opinion, there should be little in the way of discussion in the minutes.

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