

U.S. Chamber of Commerce



September 8, 2008

Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5669
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Re: Proposed Rule on Fiduciary Requirements for Disclosure in Participant-Directed Individual Account Plans

To Whom It May Concern:

On behalf of the U.S. Chamber of Commerce, we are writing this letter in response to the proposed rule on Fiduciary Requirements for Disclosure in Participant-Directed Individual Account Plans issued by the Department of Labor (“Department”) on July 23, 2008.

The Chamber is the world's largest business federation, representing more than three million businesses and organizations of every size, sector, and region. More than 96 percent of the Chamber's members are small businesses with 100 or fewer employees, 70 percent of which have 10 or fewer employees. Yet, virtually all of the nation's largest companies are also active members. The Chamber is particularly cognizant of the problems of smaller businesses, as well as issues facing the business community at large. Besides representing a cross-section of the American business community in terms of number of employees, the Chamber represents a wide management spectrum by type of business and location. Each major classification of American business—manufacturing, retailing, services, construction, wholesaling, and finance—is represented. Also, the Chamber has substantial membership in all 50 states. Positions on national issues are developed by a cross-section of Chamber members serving on committees, subcommittees, and task forces. More than 1,000 business people participate in this process.

Introduction

Ninety-two percent of all 401(k) plan participants are responsible for making investment decisions about their contributions to their retirement plan.¹ As such, it is important that these participants have the necessary tools and information to maximize

¹UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE, PRIVATE PENSIONS: *Changes Needed to Provide 401(k) Plan Participants and the Department of Labor Better Information on Fees* 5 (2007).

their investment decisions. The Chamber supports disclosure and transparency of information that allows participants to make informed decisions about their investments. In order to be beneficial to participants, however, such information should be useful and easily understood. Moreover, it is equally important that disclosure requirements are not unduly burdensome to the employer – particularly if they do not provide meaningful information to the participant. We believe that the proposed regulation strikes a reasonable balance between these requirements.

In July of this year, the Chamber submitted comments to the Employee Benefits Security Administration (“EBSA”) in response to a request for information on fee and expense disclosures to participants in individual account plans. We are pleased to see that a number of our recommendations are incorporated into the proposed rule. In particular, we are very pleased that the Department followed the suggestion of the Chamber and other commentators to not list fees on a service-by-service basis. In the on-going debate around fee disclosures, the Chamber has consistently opposed fees being listed on a service-by-service basis. Not only would such a requirement increase administrative costs and burdens but it would also provide only minimal value at best to participants. Consequently, this provision strikes an important balance between providing participants with appropriate information and not overly-burdening plan sponsors.

Comments

Neither the Proposed Nor Final Rule Should Apply to Plan Sponsors Retroactively. We are concerned that the rules may increase the potential liability of plan sponsors. The preamble to the proposal states that ERISA section 404(a) imposes a duty on plan sponsors of all participant-directed plans to provide to participants and beneficiaries the information necessary for them to make informed decisions about their investments. The preamble goes on to state that plans that have complied with ERISA section 404(c) have met these requirements but that the Department “expresses no view” with respect to other plans.² By not expressing a view, the Department has left plan sponsors in a tenuous position regarding their fiduciary duties. As the Department has not provided previous guidance in this area, plan sponsors cannot be expected to have predicted these specific requirements as part of their fiduciary duty. Many plan sponsors have interpreted their duties to ensure that participants are paying reasonable fees but have not extended that duty to include that all of the information enumerated in the proposed rules be distributed to participants in the manner and format proposed. Moreover, the rules under ERISA section 404(c) have been viewed as additional requirements and not simply a reiteration or interpretation of the requirements under ERISA section 404(a).

It would be fair to say that even if the Department has always believed that a plan sponsor’s fiduciary duty included the distribution of information on plan fees, these particular rules and interpretations are new. As such, the rules – either proposed or final

² Preamble section B.1.

– should not be retroactively applied as an interpretation of a plan sponsor’s fiduciary duty. At the very least, the Department should state that for actions prior to the finalization of these rules, a plan sponsor’s fiduciary duty should be viewed in light of the facts and circumstances and that these rules are not a guideline for what should have been expected prior to the finalization of the rules.

The Final Regulation Should Confirm a Fiduciary’s Good Faith Reliance on Information Received from a Service Provider. A footnote in the Preamble states that "fiduciaries shall not be liable for their reasonable and good faith reliance on information furnished by their service providers with respect to [investment-related] disclosures...."³ This statement is critical to providing assurance to plan sponsors in conveying information to participants. Due to the importance of this statement, we recommend that a similar statement be included in the final regulation itself and not simply in a footnote to the preamble.

The Flexibility in the Proposed Rule should be Maintained in the Final Rule. In response to EBSA’s request for information on fee disclosures to participants, the Chamber recommended that disclosure information be as efficient in length as possible to keep participants from being overwhelmed with information. We also recommend that fee information be included as part of other notice requirements to minimize the amount of notices that are being created and sent and that plan sponsors be given flexibility in the method of distribution of the notice (electronic, paper, intranet, etc.) and in design of the notice. In addition, we recommended that fees associated with a plan’s investment option should be disclosed together with other key information: the option’s investment objective and product characteristics, its historical performance and risks and the identity of the investment advisor or product provider and that participants should receive disclosure regarding any administrative or transaction flat dollar charges that have been deducted from their accounts.

We are pleased to see that most of these recommendations have been included in the proposed rule. Allowing for flexibility and efficiency in the format and distribution of disclosures will reduce the administrative burden on plan sponsors and keep participants from being overwhelmed by documentation.

The Proposed Effective Date Does Not Provide Sufficient Time for Plan Sponsors to Comply with the Rule. The effective date of January 1, 2009 gives plan sponsors insufficient time to comply.⁴ While many plans already provide some or all of the disclosures required under the proposed rule, few plans meet the specific timing and content requirements. Thus, it will be very difficult for plans to comply with the effective date because systems will need to be changed to accumulate and format the necessary information and such system changes cannot be developed until the final rule is

³ Preamble, Footnote 7.

⁴ Proposed Regulation section 2550.404a-5(b).

published. For these reasons, we recommend that the effective date of the final rule not be before the first day of the plan year that begins twelve months after the publication of the final rule.

Disclosures should be Required On or After the Date of Participation in the Plan. The proposed rule requires that plan-related and investment-related information be provided on or before the date of plan eligibility, and at least annually thereafter, to each participant or beneficiary that has the right to direct investments in their account.⁵ We recommend that the final rule require initial disclosures to participants on or before the date of participation in the plan, not the date of plan eligibility. Requiring initial disclosure on or before participation in the plan, prior to the actual selection of a designated investment alternative, provides many advantages. It will result in incorporating the disclosures required under the proposed rule into the plan enrollment process, when the employee's attention is focused on the plan features and the investment selection process. The enrollment process is often automated, and the disclosures can be efficiently incorporated, thereby keeping cost, usually paid by participants, as low as possible. Another benefit to this approach is that the cost of providing disclosures to employees who choose not to participate in the plan is avoided.

If the Department concludes that disclosures must be provided prior to or on the date of eligibility, we urge that special relief be afforded to plans that provide immediate eligibility. Plans that provide for immediate eligibility should be required to make disclosures on or before the date of participation. Without this relief, disclosure would have to be provided on or before the first day of employment. Electronic disclosure to an individual before they are employed is problematic at best, and a rigid rule requiring disclosure on the first day of employment will result in unnecessary cost and compliance exposure.

Similarly, we believe that these rules should apply only to beneficiaries actively choosing investments in the plan. ERISA defines a beneficiary as a person designated by a participant or the terms of the plan that is *or may become* entitled to a benefit under the plan.⁶ We believe the disclosures required under the proposed rule should apply only to beneficiaries with the current right to direct investments in their account and we request that the final rule clarify this interpretation. A requirement to provide disclosure to all beneficiaries would be extremely complex and costly.

Finally, it is unclear whether disclosure information must be provided annually to an employee who chooses not to enroll in the plan or whether the rule permitting use of the SPD indicates annual distribution would not be required for such an employee. The final rule should clarify that annual disclosures need to be made only to employees actively participating in the plan.

⁵ Proposed Regulation sections 2550.404a-5(c)(1) and 2550.404a-5(d)(1).

⁶ ERISA section 3(8).

Further Clarification of the Requirements Concerning Material Changes is Needed. Participants and beneficiaries must be given a description of any material changes to the required information within 30 days of their adoption.⁷ This requirement could be problematic in circumstance where a plan sponsor changes a fund line up on a prospective basis with the effective date more than 30 days after the adoption date. Moreover, it is unclear when changes in disclosures are deemed material or adopted. Thus, we recommend that the final regulations include examples to clarify these issues surrounding material changes.

Flexibility should be Maintained in the Rules Surrounding Web-based Disclosures. We applaud the Department for recognizing the importance of being able to use web site referrals as a means of providing detailed information. Certainly, in a number of cases, the ability to provide a simple Web site reference for fund-specific information will be a convenience. However, for investment alternatives that do not maintain a website there may be challenges. Moreover, for some companies the cost of providing web-available information in hard copy to participants without internet access may outweigh any benefit that the convenience provides plan sponsors. Therefore, we urge the Department to maintain a flexible approach. For example, rather than a plan sponsor having to provide information in hard copy to every participant, this information should only have to be provided upon request and within a reasonable amount of time.

In addition, the term “Internet Web site” has caused some confusion for our members.⁸ We recommend that the final rule clarify that a plan sponsor’s intranet system or any other web-based location accessible by participants and beneficiaries may be used to satisfy the disclosure requirements.

We Recommend Further Analysis of the Feasibility of Benchmark Data. Throughout the debate over plan fees, we have been concerned that plan fees be considered within the appropriate context. The requirement to provide additional information about investment performance addresses this concern. However, the requirement to include benchmarking data raises concerns. While the Department assumes that benchmarking is already a widespread practice, we continue to have concerns about (1) whether there are widely accepted benchmarks for all investment alternatives (e.g., target maturity funds) and (2) whether participants will be able to use benchmarks appropriately. This information could be very useful to participants. However, if it is not readily available, the requirement will impose an untenable burden on plan sponsors. More importantly, if participants do not understand the data, it could cause participants to make poor investment decisions.

⁷ Proposed Regulation section 2550.404a-5(c)(1)(i).

⁸ Proposed Regulation section 2550.404a-5(d)(1)(i)(B).

Conclusion

As more workers become dependent on individual account plans for retirement, it becomes increasingly important to provide participants with information that will allow them to make well-informed decisions. We very much appreciate the methodical approach the Department has taken on plan fee disclosures. We further appreciate the consideration given to our earlier comments submitted in response to the request for information. Thank you for this additional opportunity to express our concerns and we look forward to continued conversations with you and other interested parties.

Sincerely,



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