

REISH LUFTMAN REICHER & COHEN

A PROFESSIONAL CORPORATION

ATTORNEYS AT LAW

11755 WILSHIRE BOULEVARD

10TH FLOOR

LOS ANGELES, CALIFORNIA 90025-1539

TELEPHONE (310) 478-5656

FACSIMILE (310) 478-5831

Direct Fax: (310) 861-5110

www.reish.com

fredreish@reish.com

MICHAEL B. LUFTMAN
RICHARD A. LUFTMAN
LELAND J. REICHER
C. FREDERICK REISH*
TRUDI SABEL SCHINDLER
DAVID P. SCHWARTZ
MARK E. TERMAN*
MICHAEL A. VANIC
GARY A. WEXLER
NICHOLAS J. WHITE

OF COUNSEL
ADAM M. COHEN
DAVID PRATT †

*ALSO ADMITTED IN DC
**ALSO ADMITTED IN NY
***ALSO ADMITTED IN MT
†ADMITTED IN NY ONLY

AMIR A. AMINI
BRUCE L. ASHTON
HEATHER BADER-ABRIGO
MARC L. BENEZRA
STEPHANIE L. BENNETT
PASCAL BENYAMINI
KALYANI R. CHIRRA**
BRADFORD S. COHEN**
DEBRA A. DAVIS
JOSEPH C. FAUCHER
MICHAEL D. FOSTER**
ANNA FRIDMAN
ROBIN C. GILDEN
STEPHEN I. HALPER
MARTIN M. HEMING
JONATHAN A. KARP
CHARLES K. KOLSTAD**
JEFFREY D. LEWIS***

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VIA ELECTRONIC MAIL (e-ori@DOL.gov)

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

Re: Fee and Expense Disclosures to Participants in Individual Account Plans (RIN 1210-AB07)

Dear Ladies and Gentlemen:

We appreciate the opportunity to provide comments to the U.S. Department of Labor's request for information regarding fee and expense disclosures provided to participants in individual account plans (the "RFI"). We are pleased that the Department is focused on these important issues.

As employee benefits attorneys, our practice includes providing guidance to plan sponsors and service providers to retirement plans regarding the requirements of the Employee Retirement Income Security Act of 1974, as amended (ERISA).

Responses to Questions

Question 1: What basic information do participants need to evaluate investment options under their plans? If that information varies depending on the nature or type of investment option (options offered by a registered investment company, options offered under a group annuity contract, life cycle fund, stable value product, etc.), please include an explanation.

Participants need to have a basic understanding of the investments in their plans and how much they are paying for them. In order to evaluate among the investments provided in the plan, participants need to be able to compare them in a meaningful way. Thus, participants should be given a brief description of the investments and the direct expenses that they could be

required to pay as a result of selecting a particular investment. As the DOL notes in its publication "A Look at 401(k) Plan Fees," investment expenses can have a significant impact on the adequacy of the participant's retirement benefits.

The disclosures included in prospectuses do not adequately provide this information to participants. Prospectuses are legal documents that are largely written in a manner designed to protect the fund. As a result, they do not provide an easy-to-understand summary of the investment or its expenses.

Thus, we suggest that the Department require plans to provide participants with a brief summary of each of the plan's designated investment options (as opposed to investments available through a brokerage window, etc.). Additionally, participants should be given a one or two page summary of the fees related to each of the investments. This should include fees that are imposed (i) when a plan changes investment providers or (ii) a participant changes investments or takes a distribution (such as contingent deferred sales charges and redemption fees). While a participant cannot affect the change of plan investments or providers, participants should be given information about the investment related charges associated with such a change—because they may decline to invest in options that have material potential assessments (for example, back-end loads). In our experience, there are small 401(k) and 403(b) plans, and some mid-sized plans, that have contingent deferral charges (CDSCs) of 5% to 10% of the assets in the contracts (or, in other cases, of the assets placed in the contract in the last five to 10 years). Surely, an investor would want to have that kind of information before making a decision. Similar issues exist with market value adjustments (MVAs) for stable value or other guaranteed investments.

The format of the information given to participants should be consistent, regardless of the types of investments used by a plan. The information needed by participants should not vary as a result of the investments used. Participants should not be required to have an in-depth understanding of investments in order to comprehend the fee disclosure. By using different forms for different types of investments, participants whose plans change types of investments should not have to learn a new form.

Question 2: What specific information do participants need to evaluate the fees and expenses (such as investment management and 12b-1 fees, surrender charges, market value adjustments, etc.) attendant to investment options under their plans? If that information varies depending on the nature or type of option, or the particular fee arrangement relating to options (e.g., bundled service arrangements), please include an explanation.

Participants need to be given information about the direct expenses that could be charged to their accounts. This would include the expense ratio, investment-specific wrap fees, redemption fees, surrender charges (including contingent deferred sales charges), and wrap fees on total plan assets. It would not include detailed information about indirect fees such as revenue sharing.

However, participants should be generally informed if plan assets are being used directly or indirectly, to pay for recordkeeping, compliance, advice, etc. After all, plan assets are beneficially covered by the participants, and their ultimate benefits are affected, positively or negatively, by those expenses and the value of the services.

Question 3: To what extent is the information participants need to evaluate investment options and the attendant fees and expenses not currently being furnished or made available to them? Should such information be required to be furnished or made available by regulation or otherwise? Who should be responsible for furnishing or making available such information? What, if any, additional burdens and/or costs would be imposed on plan sponsors or plans (plan participants) for such disclosures?

We have only limited experience as what participants are receiving (and we believe that may vary from provider to provider). For plans that intend to comply with ERISA section 404(c), we believe that in many cases that they are receiving this information only once. We are aware of some providers who disclose expense ratios for each investment on their websites.

We suggest that the Department require fiduciaries to disclose the direct fees that could be charged to a participant's account. Fiduciaries are in the best position to be responsible for the provision of this information because they are required to understand and evaluate the reasonableness of the fees paid by the plan. If fiduciaries are required to disclose this information to participants, they will be more likely to use providers that give them this information in a usable manner, which will further encourage disclosure in this area.

Fee disclosures should be made in a uniform, summary manner on an annual basis. The information should be given to employees before or concurrently with becoming participants. However, the information could only be required to be updated on an annual basis. For example, fiduciaries could distribute the fee disclosure information on January 1st of each year. If an employee became a participant on July 1st, they would be given the same disclosure that had been made on January 1st.

Given the complexity of the fee structure in the securities industry and the costs associated with providing participant-specific fee information, we suggest that this information be provided at the plan level. At the least, information should be given to participants that allows them to approximate their actual annual cost with minimal effect. If possible, it would be preferable if participants were given reasonable approximations of the actual annual cost. That would encourage participants to seek reasonably priced investments and would encourage fiduciaries to avoid high-priced investment options. In our experience, most sophisticated observers understand that actual cost information is the most valuable to participants; the issue is whether the industry can actually deliver that information. Having said that, we are aware of at least two providers who do.

Question 4: Should there be a requirement that information relating to investment options under a plan (including the attendant fees and expenses) be provided to participants in a summary and/or uniform fashion? Such a requirement might provide that: A) all investment options available under a participant-directed individual account plan must disclose information to participants in a form similar to the profile prospectus utilized by registered investment companies; or B) plan fiduciaries must prepare a summary of all fees paid out of plan assets directly or indirectly by participants and/or prepare annually a single document setting forth the expense ratios of all investment options under the plan. 13\ Who should be responsible for preparing such documents? Who should bear the cost of preparing such documents? What are the burden/cost implications for plans of making any recommended changes? 13\ See recommendations of the GAO as set forth Report GAO-07-21 (November, 2006), <http://www.gao.gov/htext/d0721.html>.

We recommend that participants be given fee disclosure information in a uniform, single format. Participants should be able to receive the same types of information regardless of the investments selected by the plans. We suggest that all participants in 401(k) plans be provided with a one or two page summary and brief descriptions of the investment options available in the plan. Many of the leading providers already provide descriptions of the plan's investments in that format.

Question 5: How is information concerning investment options, including information relating to investment fees and expenses, communicated to plan participants, and how often? Does the information or the frequency with which the information is furnished depend on whether the plan is intended to be a section 404(c) plan?

In our experience, a weakness in the system is that fee disclosures are not made regularly to participants. There is an implicit assumption that participants will remember prior disclosures. However, while this information may not be provided regularly in paper, it is often updated on a website.

Fee information should be provided regardless of whether a plan satisfies ERISA section 404(c). Thus, we suggest that the Department apply the same fee disclosure requirements to all participant-directed plans, regardless of whether they intend to satisfy ERISA section 404(c).

Typically, for most small- and mid-sized plans, the fee disclosure is driven by the provider, and not the plan sponsor or fiduciaries. As a result, the same information is given regardless of whether a plan intends to obtain the 404(c) fiduciary protections. (In fact, the provider typically does not know whether or not the plan intends to comply with 404(c).)

Question 6: How does the availability of information on the internet pertaining to specific plan investment options, including information relating to investment fees and

expenses, affect the need to furnish information to participants in paper form or electronically?

We suggest that information be provided on the Internet or through e-mail to participants, without having to satisfy the current requirements for electronic disclosures. Participants could be notified on benefit statements that the information is available on the Internet. Participants could also elect to receive benefits statements via e-mail or regular mail.

Question 7: What changes, if any, should be made to the section 404(c) regulation, to improve the information required to be furnished or made available to plan participants and beneficiaries, and/or to improve likelihood of compliance with the disclosure or other requirements of the section 404(c) regulation? What are the burden/cost implications for plans of making any recommended changes?

The prospectus requirements in the current 404(c) regulation are expensive to administer. Also, they do not add meaningful value to participants because most participants do not read them. As a result, we suggest that the prospectus delivery requirement be replaced with a requirement that the prospectuses be available on the Internet--and the more meaningful information be provided in another format.

Question 8: To what extent should participant-directed individual account plans be required to provide or promote investment education for participants? For example, should plans be required or encouraged to provide a primer or glossary of investment-related terms relevant to a plan's investment options (e.g., basis point, expense ratio, benchmark, redemption fee, deferred sales charge); a copy of the Department's booklet entitled "A Look at 401(k) Fees" (http://www.Department.gov/ebsa/publications/401k_employee.html) or similar publication; or investment research services? Should such a publication include an explanation of other investment concepts such as risk and return characteristics of available investment options? Please explain views, addressing costs and other issues relevant to adopting such a requirement.

We suggest that the Department develop general investment education materials for participants. Fiduciaries would be required to notify participants about these materials and provide a copy to participants upon request.

Question 9: What information is currently furnished to participants about the plan and/or individual administrative expenses charged to their individual accounts? Such expenses may include, for example: audit fees, legal fees, trustee fees, recordkeeping expenses, individual participant transaction fees, participant loan fees or expenses.

Administrative expenses are usually only disclosed, if at all, to a plan's fiduciaries. That said, transaction fees that are paid by participants are typically disclosed. For example, participants are usually given information about the costs for taking a loan, qualifying a domestic relations order, having access to a brokerage account, and receiving a distribution.

These disclosures are usually made when the service is requested. Summary Plan Descriptions (SPD) may also include a general statement about fees.

Question 10: What information about administrative expenses would help plan participants, but is not currently disclosed? Please explain the nature and usefulness of such information.

Participants should be given information about administrative expenses that may be directly charged to their accounts. Participants should be given sufficient information to determine if they want to engage in a particular transaction. Additionally, general information about administrative expenses will help them to evaluate whether they want to participate in the plan. They can also use this information to initiate discussions with the fiduciaries about the plan's fees.

The current 404(c) regulation appears to contemplate investments in mutual funds and company stock. The disclosure requirements make sense in that context. However, the regulation is inadequate for other types of investments, including partnerships and hedge funds. The regulation should be amended to clarify that the information required to be disclosed to obtain the fiduciary protection is not exclusive. In other words, the regulation should provide that participants must be given the material information needed to make informed investment decisions but, at the least, the information specified in the regulation.

Question 11: How are charges against an individual account for administrative expenses typically communicated to participants? Is such information included as part of a participant's individual account statement or furnished separately? If separately, is the information communicated via paper statements, electronically, or via website access?

Administrative fees are often not communicated to participants.

Question 12: How frequently is information concerning administrative expenses charged to a participant's account communicated?

SPDs may include general disclosures that fees may be deducted from a participant's account.

Question 13: What, if any, requirements should the Department impose to improve the disclosure of administrative expenses to plan participants? Please be specific as to any recommendation and include estimates of any new compliance costs that may be imposed on plans or plan sponsors.

Participants should receive a one or two page summary of the administrative expenses that may be paid by from their accounts. Participants do not need the same level of detail as fiduciaries because they serve different roles regarding the plan. However, they should be given summary information to enable them to evaluate the fees that may be assessed against

their accounts. This is particularly important for transaction and investment fees where participants will be making decisions that could result in the assessment of a fee.

Further, the SPD should generally describe the types of fees that might be charged to participants' accounts.

Question 14: Should charges for administrative expenses be disclosed as part of the periodic benefit statement required under ERISA section 105?

Additional information about administrative expenses should not be included on benefit statements, other than a brief description of how they can obtain information about administrative expenses. This is because benefit statements are becoming mini-SPDs, thus reducing their impact and value for their primary purpose.

15. What, if any, distinctions should be considered in assessing the informational needs of participants in plans that intend to meet the requirements of section 404(c) as contrasted with those of participants in plans that do not intend to meet the requirements of section 404(c)?

As an overall comment, we suggest that the regulations to ERISA section 404(c) be revised such that it provides plan sponsors with a safe harbor. This would enable a fiduciary to obtain a level of confidence that he has complied with the requirements necessary to obtain the protections under 404(c). As a result, the requirements for obtaining that protection should be straightforward and the necessary disclosures should be limited to the information that participants need to make informed investment decisions. We suggest that the disclosure requirements for mutual funds (and other diversified investments regulated by governmental agencies, such as the SEC) be limited to the following provisions: (i) a statement that the plan is intended to comply with 404(c) and relief from liability;¹ (ii) a description of investment alternatives;² (iii) identification of designated investment managers;³ (iv) an explanation of the circumstances under which participants and beneficiaries may give investment instructions and any limitations on the instructions;⁴ (v) a description of transaction fees and expenses (including investment expenses related to changes in provider or changes in investments at the plan level);⁵ (vi) contact information for the fiduciary; and (vii) a description of the information available upon request.⁶ For purposes of the safe harbor, we recommend that fiduciaries not be required to

¹ DOL Reg. § 2550.404c-1(b)(2)(i)(B)(1)(i).

² DOL Reg. § 2550.404c-1(b)(2)(i)(B)(1)(ii).

³ DOL Reg. § 2550.404c-1(b)(2)(i)(B)(1)(iii).

⁴ DOL Reg. § 2550.404c-1(b)(2)(i)(B)(1)(iv).

⁵ DOL Reg. § 2550.404c-1(b)(2)(i)(B)(1)(v).

⁶ DOL Reg. § 2550.404c-1(b)(2)(i)(B)(1)(vi).

provide prospectuses,⁷ except upon request and automatic disclosure would not be required for materials related to the exercise of voting, tender or similar rights.⁸

For all other investments, additional disclosures should be required for material information needed to make informed investment decisions.

16. What (and what portion of) plan administrative and investment-related fees and expenses typically are paid by sponsors of participant-directed individual account plans? How and when is such information typically communicated to participants?

We assume that consultants and providers will comment on this. In our experience, whether the plan fees are borne by the plan sponsor varies depending on the size of the plan (by size, we mean number of participants) and the nature of the plan sponsor. For example, many professional services organizations (e.g., law firms and accounting firms) that sponsor participant-directed plans will pay the administrative fees and expenses. In the case of traditional commercial companies, in most cases the expenses are paid by the plan largely or entirely through revenue sharing.

Information regarding fees and expenses is not typically communicated to participants, except for transaction-level fees and expenses. These are often discussed in general terms in the summary plan description. Transaction-level expenses are typically also disclosed upon a participant's initiation of a specific transaction. For example, the fees associated with taking a participant loan would be disclosed to the participant at the time he requested a loan.

17. How would providing additional fee and expense information to participants affect the choices or conduct of plan sponsors and administrators, and/or that of vendors of plan products and services? Please explain any such effects.

One result of requiring that additional information on fees and expenses be furnished to participants is that plan sponsors will be more likely to scrutinize plan fees. For example, the plan sponsor may be more likely to investigate the charges made by service providers and investigate revenue sharing and total costs if it knows that participants have this information.

Further, as participants receive more information, they will learn how to evaluate that information and will be more likely to ask questions about the reasonableness of the expenses. In addition, advisers and commercial services will assist participants in comparing the costs to reasonable benchmarks.

Another effect of full disclosure will likely be that prices will be more reflective of actual costs with a narrower profit margin. For example, in cases where the vendor receives

⁷ DOL Reg. § 2550.404c-1(b)(2)(i)(B)(1)(viii).

⁸ DOL Reg. § 2550.404c-1(b)(2)(i)(B)(1)(ix).

revenue sharing and the amount of that compensation is disclosed, to the extent the revenue sharing exceeds the cost, plus a reasonable profit, it is likely that those additional amounts will be rebated to the plan. In fact, as larger- and mid-sized plan sponsors become more sophisticated (with the help of consultants), that has already begun to happen. Finally, with full disclosure it will become more difficult for less principled providers and advisers to change excessive amounts.

18. How would providing additional fee and expense information to participants affect their plan investment choices, plan savings conduct or other plan related behavior? Please explain any such effects and provide specific examples, if available.

If participants are fully informed of the fees and expenses associated with the plan, participants will be in a better position to decide which investments to select for their accounts, based in part on the overall cost of the investments.

Additionally, participants are likely to consider whether or not to participate in the plan. For example, a participant may decide that it is more cost-effective to save outside of the plan given the level of expenses attendant to the plan (particularly if the employer does not make matching contributions).

While it is common for providers to disclose expense ratios of investments, frequently expense information is either not disclosed or is not obvious. For example, participant accounts may be charged for certain plan level expenses or fees that are not the result of participant acts. Consider the case of a surrender charge or a market value adjustment on a stable value investment that is triggered when the plan surrenders the contract, under current rules, the participants are not required to be notified of such fees or adjustments, but their accounts may be negatively impacted in those situations. In some cases, disclosure of those fees may deter participants from participating in the plan--especially if the disclosure reveals that substantial charges (*e.g.*, 10%) may be assessed against participant accounts because, *e.g.*, the plan sponsor switches vendors.

Alternatively, some employees may have been deterred from participating in the plan given the media coverage surrounding hidden fees in plans. As a result, the participant may be more likely to participate in the plan if he feels as though expenses are not being hidden.

The disclosure of fees and expenses to a plan participant should also involve an education element. Consider a participant who has a \$150,000 balance in a participant-directed plan who receives a disclosure that he paid 1% in fees (\$1,500). The participant may focus on the fact that his account was reduced by \$1,500 to pay fees and expenses without considering whether the fees are reasonable or what he received in return for the fees. That is, without education the participant does not have the context for evaluating whether the fees charged are reasonable or, for that matter, unreasonable.

19. Please identify any particularly cost-efficient (high-value but inexpensive) fee and expense disclosures to participants, and to the contrary any particularly cost-inefficient ones. Please provide any available estimates of the dollar costs or benefits of such disclosures.

Currently some providers are putting reasonable estimates of participant-level costs on the participant statements. For those providers, there is no additional cost to doing it because they have already developed computer programs to gather information. Obviously, there would be some cost involved in preparing that information for providers that have not developed those systems. However, the fact that some providers (that is, recordkeepers) have been able to cost effectively make those changes suggests that others could also do it. When compared to the considerably greater value to participants of knowing the real impact of the fees on the accounts, the cost-benefit analysis would seem to favor reporting reasonable estimates of actual cost.

As a final comment, we applaud the Department on its work in the area of plan fees and expenses. We believe that the result will be that many more plan sponsors and participants are well-informed about the costs and fees of retirement plans.

Thank you for consideration of these comments. Please do not hesitate to contact us if we can be of additional assistance.

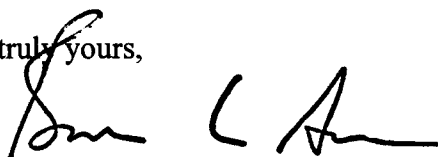


C. FREDERICK REISH



DEBRA A. DAVIS

Very truly yours,



BRUCE L. ASHTON



STEPHANIE L. BENNETT