THE WAGNER LAW GROUP
A PROFESSIONAL CORPORATION
99 SUMMER STREET, 13TH FLOOR • BOSTON, MA 02110 • (617) 357-5200

FACSIMILE	E-MAIL	WEBSITE
(617) 357-5250	marcia@wagnerlawgroup.com	www.erisa-lawyers.com www.wagnerlawgroup.com

July 30, 2007

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

ATTN: Request for Information on 401(k) Fees

To Whom It May Concern:

Further to my comment of July 24, 2007, and as promised, I provide the following supplemental information for your consideration. We appreciate the hard work of the professionals at the Department of Labor (the "Department") in proposing this regulation in so short a timeframe. We hope that these comments will assist the Department in improving the regulation, so that even more plan sponsors benefit from making default investments safer and more protective of participants and beneficiaries.

Lack of Disclosure by a Particular Type of Vehicle

Tiered mutual funds, such as target date funds and lifecycle funds in most cases, involve undisclosed and unregulated self dealing or self dealing that is prohibited by ERISA.[1] Such vehicles place participants at added risk since if the allocation of the funds is skewed by self interest then participants' asset allocation will not be appropriate. Therefore, the potential for self dealing inherent in most such vehicles must be disclosed, and it is not surprising that some courts have already found a disclosure responsibility under the general fiduciary rules.[2]

[1] Tiered asset allocation mutual funds are mutual funds consisting of shares of other mutual funds, otherwise known as a "fund of funds", in which the assets are allocated amongst the underlying mutual funds by the fund's investment advisor, for example, life cycle funds. The underlying mutual funds almost always charge different fees. Such allocation would constitute prohibited self dealing if the allocations were subject to ERISA's prohibited transaction protections.

[2] A growing body of case law deals with the fiduciary duty to disclose relevant information to plan participants and beneficiaries. A preeminent text regarding Title I issues, ERISA Fiduciary Law (Serota, Susan P., ERISA Fiduciary Law, Bureau of National Affairs (1995)), has added a chapter in its supplement (Chapter 16) which addresses this topic, in recognition of its growing importance. A number of cases cited in this Chapter take the position that fiduciaries are required to disclose facts that are material to a participant's decision that are typically not known to participants. In this connection, plan fiduciaries who select certain investment vehicles may be required under ERISA to disclose conflicts of interests inherent in such vehicles.

It may not be prudent to not to disclose the conflicts, because a number of mutual fund advisors have recently demonstrated that they did not hesitate to act to increase their own fees, even where such actions are inconsistent with their prospectuses and applicable law (e.g., market timing and insider trading). In point of fact, Professor Nicolaj Siggelkow of the Wharton School has demonstrated a systemic and pervasive tendency for mutual fund advisors to maximize their own fee income or profits.[3] It follows that there is the potentiality and indeed a likelihood for at least some asset allocation mutual fund advisors to maximize their fees and profits by modifying the underlying asset allocations. Professor Siggelkow's research indicates that mutual fund advisors will generally seek to maximize their profits; there is no reason to believe that tendency could not or might not affect asset allocation in an asset allocation mutual fund, which could corrupt the asset allocation process. Here, the conflict of interest is not regulated, or even required to be disclosed by federal securities law, and the amounts to be gained by skewing asset allocation are potentially enormous. Therefore, it is critical to disclose to participants the conflict of interest inherent in such structures.

Plan participants should also be informed of any action that plan sponsors have taken to ameliorate the risk of self dealing inherent in such funds. The importance of such a review is significant, as with tiered mutual funds, there may be even less protections than in the conflicted investment advice opined on by the Department of Labor when Secretary Alexis M. Herman in her letter of July 19, 2000 to the Honorable William F. Goodling, Chairman of the Committee on Education and the Workforce of the U.S. House of Representatives, strongly opposing H.R. 4747, The Retirement Security Advice Act of 2000, H.R. 4749, the ERISA Modernization Act, and H.R. 4748, the Comprehensive ERISA Modernization Act of 2000. These bills would have effectively removed investment advice from the application of the prohibited transaction protections, enabling the provision of conflicted advice with little safeguard from abuse.

The Secretary opined:

> "The 'Retirement Security Advice Act' would effectively leave retirement plan participants and beneficiaries vulnerable to bad and, in some cases, conflicted investment advice with little or no meaningful recourse if they rely on it. The bill would create a statutory exemption from the prohibited transaction rules for 'fiduciary advisers' who provide investment advice to a plan, or to its participants or beneficiaries. Such advisers would be required to disclose their fee arrangements and interest in any assets they recommend for purchase or sale (along with other required disclosures); in return, they could not be held liable under ERISA's per se prohibitions for the advice they render. Participants harmed by the advice would have to show that the advice was imprudent, a much more difficult task than showing a conflict of interest. This alteration of the rights and remedies that currently govern the provision of investment advice would place the risk of bad investment advice squarely on the participant. . ."

---

[3] Siggelkow, Nicolaj, "Caught Between Two Principals," Wharton School, 2004.

> Note that in the case of the conflicts posed by tiered asset allocation mutual funds, there is no duty of disclosure imposed by Federal Securities Law so the danger posed is more severe and should be specifically disclosed by ERISA as well as any action by plan sponsors to review and ameliorate such conflicts.
>
> With regard to similar conflicts in the ERISA Modernization Act, the Secretary opined:
>
> "The changes would weaken or eliminate rules designed to prevent the abuse of benefit plans by persons who profit from their dealing with plan funds. This would shift responsibility from persons who are in the business of offering such products and services and are most knowledgeable about the market to persons who hire and monitor such persons, usually plan sponsors, who typically know far less. We believe that such a shift would lead to abusive arrangements. This would also increase the responsibility of plan sponsors because they would now be dealing with persons who are subject to a less protective regulatory framework. The increased responsibility could discourage plan sponsors, who are sensitive to increased potential liability and regulatory burdens, from establishing and continuing to maintain employee benefit plans."

The same issues with which Secretary Herman was concerned argue for disclosure of the conflicts of interest inherent in most tiered asset allocation mutual funds. Therefore, plan participants should receive from plan sponsors information concerning any actions that they have taken with respect to selecting and monitoring a tiered asset allocation mutual fund including whether they have had an independent expert review and approve the adviser's algorithms or "black box" used to create the investment allocations.

Conclusion Concerning Tiered Asset Allocation Mutual Funds

The manner in which most tiered asset allocation mutual funds operate raise a number of issues under ERISA. Given the importance of asset allocation, and the proven propensity of certain persons who operate mutual funds to self deal, the conflicts of interest inherent in such funds must be disclosed. Further, plan sponsors who select and monitor such funds should also disclose any action (or lack of action) they have taken to address the real or potential harm that could be caused by these conflicts of interest.

If specific disclosure is not required, plan sponsors will incur additional expense and/or additional risks because courts will be more likely to impose such duties under the general fiduciary rules of ERISA in a manner that is less predictable than the specific rules that could be provided by the Department. In this regard, it would be useful if the Department could suggest model language plan sponsors could use to disclose the conflict of interest inherent in such funds.

Disclosure of Importance of Considering Other Assets

Also, plan participants should be informed that tiered asset allocation mutual funds do not take account of assets held outside a plan and therefore should receive disclosure that if they hold substantial assets outside of the plan then the asset allocation provided by the fund, even if not conflicted, is likely to be inappropriate. Academic studies demonstrate the importance of being on, or close to, the efficient frontier. An investment alternative that selects a mixture that does not take account of assets held outside of a plan including, for example, significant benefits earned or to be earned under a defined benefit plan is, by its very design, likely to miss the optimal range on or close to the efficient frontier by a large margin. This is because the benefit provided under a defined benefit plan is very similar to a bond fund, and will generally cause a participant's account to be over-weighted in bonds unless it is taken into account. Participants should be provided with this and like information.

* * * * *

Thank you for your attention to and consideration of this comment.

Sincerely,

/s/ Marcia S. Wagner

Marcia S. Wagner