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August 2, 2010

Hon. Phyllis C. Borzi
Assistant Secretary of Labor
Employee Benefits Security Administration
U.S. Department of Labor
Frances Perkins Building
200 Constitution Avenue, NW
Washington, DC 20210

Re: Comments on Department of Labor Proposed Regulations on Participant Fee Disclosure

Dear Assistant Secretary Borzi:

Enclosed are comments on Department of Labor proposed regulations on participant fee disclosure. These comments represent the views of the American Bar Association Section of Taxation. They have not been approved by the Board of Governors or the House of Delegates of the American Bar Association, and should not be construed as representing the policy of the American Bar Association.

Sincerely,

Stuart M. Lewis
Chair, Section of Taxation

Enclosure

cc: Douglas Shulman, Commissioner, Internal Revenue Service
Michael Mundaca, Assistant Secretary (Tax Policy), Department of the Treasury
William Wilkins, Chief Counsel, Internal Revenue Service
Robert Doyle, Director, Office of Regulations and Interpretations, Department of Labor
Louis Campagna, Chief, Division of Fiduciary Interpretation, Department of Labor
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ABA SECTION OF TAXATION
COMMENTS ON DEPARTMENT OF LABOR PROPOSED
REGULATIONS ON PARTICIPANT FEE DISCLOSURE

These comments (“Comments”) are submitted on behalf of the American Bar Association Section of Taxation and have not been approved by the House of Delegates or Board of Governors of the American Bar Association. Accordingly, the Comments should not be construed as representing the position of the American Bar Association.

Principal responsibility for preparing these Comments was exercised by Bernard F. O’Hare, Chair Emeritus of the Defined Contributions Plan Subcommittee of the Employee Benefits Committee of the Section of Taxation, Robert Miller, Chair of the Defined Contributions Plan Subcommittee, and Matthew Eickman, Young Lawyer Liaison of that Subcommittee. The Comments were reviewed by Joni L. Andrioff, Vice Chair of the Employee Benefits Committee and Eleanor Banister, Chair of the Employee Benefits Committee. The Comments were further reviewed by the Quality Assurance Group of the Employee Benefits Committee, which is made up of former chairs of the Employee Benefits Committee and chaired by Pamela Baker. The Comments were further reviewed by David Mustone on behalf of the Committee on Government Submissions of the Section of Taxation and by Thomas R. Hoecker, Council Director for the Employee Benefits Committee.

Although the members of the Section of Taxation who participated in preparing these Comments have clients who might be affected by the principles addressed by these Comments, no such member or the firm or organization to which such member belongs has been engaged by a client to make a government submission with respect to, or otherwise to influence the development or outcome of, the specific subject matter of these Comments.

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Date: August 2, 2010

EXECUTIVE SUMMARY

Section 404(c) of the Employee Retirement Income Security Act of 1974, as amended (“ERISA”),¹ sets forth the requirements that afford certain plan fiduciaries with relief from fiduciary responsibility with respect to defined contribution plans that allow participants to direct the investments of their plan accounts. Existing U.S. Department of Labor (the “Department”) regulations (“DOL Regulations”) promulgated under section 404(c) provide for the disclosure of investment- and expense-related information to plan participants.

The proposed addition of section 2550.404a-5 to, and the related amendment to section 2550.404(c)-1 of, the DOL Regulations (collectively, the “Proposed Regulation”)² would add new requirements for providing participants notice of their investment rights under the plan and the investment alternatives designated by the plan, along with related expenses, into which participants may direct the investment of their plan accounts (“designated investment alternatives”), and would treat the provision of such information as a matter of fiduciary duty. In response to requests for comments from the Department, we recommend, as discussed in greater detail below, that the regulation, when finalized:

1. Provide a later deadline for the initial notice to participants and beneficiaries than required under the Proposed Regulation, and clarification as to which participants and beneficiaries are required to receive the initial notice. Specifically, we recommend that the regulation:

- (a) Require fiduciaries to provide the initial notice to a participant on or before the later of (i) the date that the participant is first eligible and in a position under the plan terms and procedures to exercise investment authority, or (ii) 30 days prior to the initial allocation to the participant’s account (or in the case of a plan which permits investment elections less frequently than on a daily basis, to the latest date that the plan would permit the participant to make an investment election that would apply to such initial allocation);
- (b) Provide that the notice requirements do not apply with respect to a beneficiary until he or she has obtained the right to direct investments of an account under the plan; and
- (c) Require fiduciaries to provide the initial notice to a beneficiary no later than 60 days following the plan administrator’s receipt of actual knowledge that a beneficiary has become entitled to make investment decisions (e.g., as a result of the death of the participant) and of the identity and location of the beneficiary involved.

2. Do the following:

¹ Unless otherwise indicated, references to a section are to a section of ERISA, and references to a section of the regulations are to a section of Title 29 of the Code of Federal Regulations.

² 73 Fed. Reg. 43014 (July 23, 2008).

- (a) Require that notice of a material change to the information provided in the initial and annual notices be provided no later than the latest of (i) 30 days after the change is adopted, (ii) 30 days prior to the effective date of the change, or (iii) as soon as practicable, but not later than 30 days, after the fiduciary responsible for notifying participants has been provided notice of the change; and
 - (b) Clarify, by way of examples and a list of principles or factors to be considered, how to determine when such a change is “material”; and clarify that the notice of material change is required to be given only to: (i) participants with the authority to direct investments in the plan; and (ii) beneficiaries who have received the right to make investment decisions with respect to an individual account under the plan.
3. Clarify that a designated investment alternative may be treated as having a fixed investment return even if the interest rate for the fixed rate of return may be reset by the insurance company or other financial providers or guarantors at periodic intervals (*e.g.*, quarterly).
4. Define “designated investment alternative” to expressly exclude not only brokerage windows and brokerage accounts, but also mutual fund windows.
5. Permit the disclosure of fees charged to a participant’s account for plan administrative services (*e.g.*, legal, accounting, recordkeeping) to be expressed in either a dollar amount or as a percentage of the account.
6. Delete the requirement to disclose fees for services provided on an individual basis (*e.g.*, loan processing fees or qualified domestic relations orders “(QDROs)”) that do not relate to participant investment decisions.

COMMENTS

BACKGROUND

These Comments are in response to the request by the Department for public comments regarding the Proposed Regulation. We appreciate the substantial work that the Department has devoted to the Proposed Regulation in this very important area of disclosure of investment- and expense-related information to plan participants. We agree with the Department that where, as permitted by ERISA (and whether within or outside of the regulations under section 404(c)), responsibility for making investment decisions is delegated to plan participants, those participants should receive meaningful information regarding their investment authority, the designated investment alternatives, and related expenses. Further, we commend the Department for striving to develop rules under which sufficient information would be provided to plan participants for them to reasonably exercise such investment discretion, yet in a relatively simple and understandable format, and in a manner that takes into account the burden on plan fiduciaries and providers of gathering and providing the information. Our comments, below, are intended to further these goals.

DISCUSSION

1. **TIMING OF DISCLOSURE OF INVESTMENT- AND PLAN-RELATED INFORMATION**

Summary

The Proposed Regulation contains notice provisions that would require a fiduciary (or its delegate) to provide each “participant or beneficiary” four particular categories of information “on or before the date of plan eligibility and at least annually thereafter.”³ Those categories are: (1) general investment instructions and voting rights; (2) administrative expenses; (3) individual expenses; and (4) specific investment-related information. Additionally, the Proposed Regulation would require a fiduciary (or its delegate)⁴ to provide a statement, at least quarterly, that includes the administrative and individual expenses actually charged to an account, as well as a description of services for which those expenses were incurred.⁵

³ Prop. Reg. § 2550.404a-5(c)(1)(i), (c)(2)(i), (c)(3)(i), & (d)(1), 73 Fed. Reg. 43014, 43039 (July 23, 2008).

⁴ Prop. Reg. § 2550.404a-5(c) & (d), which largely set forth the substantive disclosure requirements, both specifically refer to the disclosure being provided by a “fiduciary (or a person or persons designated by the fiduciary to act on its behalf).” Moreover, we note that the Proposed Regulation does not appear to preclude delegation of duties by fiduciaries under ordinary ERISA delegation procedures, including section 405(c). We agree that permitting delegation of the disclosure duties set forth in the Proposed Regulation is appropriate, and references to fiduciaries in the remainder of these comments are intended to include persons designated by a fiduciary to act on its behalf. In many instances, the plan administrator is the fiduciary which initially would be responsible for providing notice. References in these comments to the plan administrator are intended as references to persons responsible for providing the notice (including those who have such authority under ordinary ERISA delegation procedures).

⁵ Prop. Reg. § 2550.404a-5(c)(3)(ii), 73 Fed. Reg. 43014, 43039 (July 23, 2008).

Recommendation

We recommend that the regulation, when finalized, provide a later deadline for the initial notice to participants and beneficiaries than that required under the Proposed Regulation, and clarification as to which participants and beneficiaries are required to receive the information. Specifically, we recommend that the regulation:

- (a) Require fiduciaries to provide the initial notice to a participant on or before the later of (i) the date that the participant is first eligible and in a position under the plan terms and procedures to exercise investment authority, or (ii) 30 days prior to the initial allocation to the participant's account (or, in the case of a plan which permits investment elections less frequently than on a daily basis, to the latest date that the plan would permit the participant to make an investment election that would apply to such initial allocation);
- (b) Provide that the notice requirements do not apply with respect to a beneficiary until he or she has obtained the right to direct investments under the plan; and
- (c) Require fiduciaries to provide the initial notice to a beneficiary no later than 60 days following the plan administrator's receipt of actual knowledge that a beneficiary has become entitled to make investment decisions (*e.g.*, as a result of the death of the participant) and of the identity and location of the beneficiary involved.

Explanation

Initial Notice to Participants. The purpose of the notice requirements in the Proposed Regulation, as we understand it, is to provide each participant who has investment responsibility with appropriate information regarding plan investments and related fees. As a result, rather than the date of eligibility to participate in the plan, we submit that the initial notice requirements should be triggered based upon when the participant is eligible to make investment elections and when the initial allocations will be made to the participant's account. Specifically, we recommend that the initial notice be required by the later of (a) the date that the participant is first eligible and in a position under the plan terms and procedures to exercise investment authority, or (b) 30 days prior to the initial allocation to the participant's account (or, in the case of a plan which permits investment elections less frequently than on a daily basis, to the latest date that the plan would permit the participant to make an investment election that would apply to such initial allocation). Our view is that tying the initial notice requirements to the date of plan eligibility creates unnecessary administrative burdens, potentially reduces the value of the disclosures for participants, and does not serve the goal of providing participants with investment and fee information within a reasonable time before their initial investment decisions would be made or become effective.

For profit sharing plans that provide only for annual employer contributions, employees may become eligible to participate long before the first amounts are allocated to their accounts. In a simple example, suppose that a calendar year employer maintains a calendar year plan and an employee first meets the eligibility requirements on January 1, 2009. The employer

contribution for 2009 may be made as late as September 15, 2010, the tax return due date for 2009, with extensions. If the initial notice is triggered by eligibility to participate in the plan, the notice would have to be provided approximately 21 months before the time any exercise of investment discretion would first become effective. Moreover, when there is a significant delay between eligibility and the date investment discretion can be first exercised, detailed information may be less useful than if provided closer to the date that investment discretion may first be exercised. Our experience suggests that many participants may discard materials provided at eligibility or, at best, stow them away and then forget that they have them when the time comes to make an investment decision. The rule we have suggested would, instead, allow the initial provision of investment information to be made as late as 30 days prior to the initial allocation (by approximately August 16, 2010, in the above example, assuming the plan permits daily investment directions), which would make it more useful to the participants.

In this regard, we note that the regulations regarding qualified default investment alternatives (the “QDIA regulations”) allow the initial notice to be provided to participants at least 30 days in advance of the date of any first investment in the qualified default investment alternative on behalf of the participant or beneficiary.⁶ Thus, in our view, those regulations appropriately permit the timing of the notice to relate to the date amounts are first invested. With one minor adjustment described below, we recommend that similar treatment be afforded under the final participant fee disclosure regulation.

With respect to plans that permit investment elections to be made on a less frequent basis than daily, we note that a notice provided 30 days prior to the initial allocation might be received either after the latest date on which the participant could make an investment election applicable to the initial allocation or only a few days before that date. We therefore recommend that, for plans which do not permit daily investment direction, the 30-day period be measured from the latest date on which the participant could make an investment election applicable to the initial allocation.⁷

Our recommendation would also be appropriate and workable for plans that provide for immediate eligibility to participate.⁸ In that instance, our recommendation would permit the

⁶ Reg. § 2550.404c-5(c)(3)(i)(A). In this regard, the preamble to the final QDIA regulations indicated that allowing administrators to use this rule for satisfying the advance notice requirement (as an alternative to a rule based solely to the date of plan eligibility) was “intended to accommodate circumstances other than elective contributions.” (72 Fed. Reg. 60452, 60454 (October 24, 2007).) It would be helpful if the regulation, when finalized, would also accommodate plans with contributions other than elective deferrals. Of course, the final QDIA regulations made the “30 days in advance of any first investment” standard generally available with respect to all types of contributions, which we submit would also be appropriate with respect to the final regulation.

⁷ In the preamble to the final QDIA regulations, the Department also noted that “if a fiduciary fails to comply with the final regulation for a participant’s first elective contribution because a notice is not provided at least 30 days in advance of plan eligibility, the fiduciary may obtain relief for later contributions with respect to which the 30-day advance notice requirement is satisfied.” (72 Fed. Reg. 60452, 60454 (October 24, 2007).) We submit that a similar analysis should apply when finalizing the Proposed Regulation, so that any potential breach would be limited to periods prior to the end of the applicable advance notice period.

⁸ For this purpose, a plan that offers immediate eligibility is one that requires no age or service requirement for entry and allows any date to be an entry date. In such a plan, the eligibility requirements are met at the date of hire. Under a literal reading of the Proposed Regulation, it would appear that “date of eligibility” would be the date of hire for such a plan. This would seem to be the case even though, under the plan procedures, a participant may not

initial investment information to be provided at the time the participant is first eligible under plan terms and procedures to exercise investment authority (which may be later than the date of plan eligibility). In contrast, we submit that it would be impractical and nearly impossible for such a plan to comply with the Proposed Regulation's requirement that fiduciaries provide notice to a participant on or before the date of his or her initial plan eligibility – at least if the “date of plan eligibility” is construed to mean the date of hire.⁹ In that case, the Proposed Regulation would appear to require a fiduciary to distribute notices to immediately eligible employees on the first day of employment. If so, this would be a difficult and challenging standard for most fiduciaries to satisfy. Where a plan service provider has accepted primary responsibility for making required plan disclosures – which, in our experience, is increasingly common – it may be difficult and impractical for service providers to track hiring and eligibility on a daily basis. In this instance, a plan service provider simply will not know when each employee is hired and immediately eligible. Employers with multiple employment locations would face similar difficulties. Those employers commonly administer all benefits in one central location but often hire employees on a local basis. The transmission and collection of new hire information in these circumstances typically does not occur immediately upon hire.

In addition, if an employer or service provider intends to provide the investment and fee information electronically, it would be difficult to accomplish that disclosure on the first day of employment. It is not uncommon for newly hired employees to receive computers, computer connections, passwords and the computer orientation needed to access an employer's or service provider's computer network several days after their actual date of hire. Additionally, the process may be further delayed if the applicable electronic disclosure scheme requires a participant's affirmative electronic consent.

Moreover, in our experience, employers often provide newly hired employees with a benefit plan orientation which is separate from the general employee orientation, and the benefit plan orientation may not be held on the date of hire. In that instance, it might make sense for the requisite notice to be provided at the time of the benefits orientation, which would be consistent with our recommendation. Further, as a practical matter, immediate eligibility often is intended merely to permit compensation to be taken into account for plan benefit purposes beginning on the date of hire. In a 401(k) plan, the actual deferral election could occur any time up to the relevant pay date. Thus, the date of hire is not the date that an employee must actually start making decisions regarding plan contribution and investment elections.

Finally, requiring notice to be provided on date of hire for immediate eligibility plans could cause employers to have to amend plans unnecessarily to delay entry, to replace electronic disclosure with paper disclosure, or to revise procedures so that paper disclosure would be provided at all locations on the date of hire instead of by mail from a central location or a third-

be in a position to affirmatively elect to enroll and make deferrals until a short period thereafter, often when an enrollment package has been provided.

⁹ If the Department intends for the “date of eligibility” to mean the earliest time that the participant could effectively enroll, either affirmatively or by default, then it would be helpful if the regulations could clarify that point. In such case, the result would be similar to our recommendation, which focuses on the date the employee is both eligible and actually in a position, under the plan terms and procedures, to make an investment election.

party administrator. We are concerned that such a result would not be beneficial for participants and could increase plan costs – which are often borne by participants.

For the reasons set forth above, we believe that it is more practical and useful to tie the initial notice requirements to a participant’s initial ability to exercise investment authority under a plan or, if later, 30 days prior to the date amounts are first allocated to the employee’s account (or, in the case of a plan which permits investment elections less frequently than on a daily basis, to the latest date that the plan would permit the employee to make an investment election that would apply to such initial allocation). Our recommended rule would allow fiduciaries to distribute the necessary plan- and investment-related information at a time when the participant will be more likely to focus on the information, yet still have the time and opportunity to utilize the information in making decisions. Further, our recommended approach would minimize unnecessary costs to the plan by providing information only to those participants who actually participate in the plan.

Beneficiary Eligibility. Fiduciaries also need additional clarification and flexibility with respect to the beneficiary notice requirements. We recommend that the precise date of a beneficiary’s “date of plan eligibility” be clarified. The Preamble recites the Department’s view that sections 404(a)(1)(A) and (B) impose on fiduciaries of all participant-directed individual account plans a duty to furnish beneficiaries with information necessary to carry out their account investment responsibilities in an informed manner.¹⁰ The Proposed Regulation is intended to ensure that all beneficiaries “have the information they need to make informed decisions” about those responsibilities.¹¹ Without necessarily endorsing the Department’s view, we assume the Department intended for a beneficiary’s “date of plan eligibility” to be the first date on which the beneficiary obtains a right to make investment decisions under the plan. That is, we assume fiduciaries would not be required to provide initial and ongoing annual notices to individuals simply because they are listed on a participant’s beneficiary designation form but before they have investment authority over an individual account under the plan. Such a requirement would result in the distribution of information useless to beneficiaries who do not yet (and may never) have any plan investment rights. Therefore, we recommend that the regulation, when finalized, clarify that the notice requirements apply to beneficiaries only if and when the beneficiaries have the authority to direct the investment of their accounts.¹²

Initial Notice to Beneficiaries. Even if a beneficiary’s “date of plan eligibility” does not occur until he or she is first entitled under the plan document to make investment decisions, it would be difficult – in fact, impossible in most cases – to provide information on or before that date. At least in theory, beneficiaries may receive their interest in a plan upon a participant’s death, and may, under plan terms, be eligible to make investment elections at that time. In reality, though, a fiduciary may not know of a participant’s death until well after the participant has died, particularly if the participant terminated employment before his or her death. And even after a fiduciary learns of the participant’s death, the fiduciary must still identify and locate the beneficiary, and take steps through a record keeper to establish an account in the beneficiary’s

¹⁰ 73 Fed. Reg. 43014, 43015 (July 23, 2008).

¹¹ 73 Fed. Reg. 43014, 43014 (July 23, 2008).

¹² Indeed, this approach may even be implicit in the existing language in the Proposed Regulation, which limits the notice requirements to plans that allow participants to direct investments, and ties the initial notice to an individual’s “date of plan eligibility.”

name. Other beneficiaries receive their plan rights as alternate payees pursuant to a QDRO. Given the frequency of retroactively effective QDROs and the time needed to establish an account for an alternate payee upon approval of a domestic relations order as a QDRO, a fiduciary also cannot ensure that an alternate payee receives plan- and investment-related information on or before the effective date of his or her rights under the QDRO.

Our recommended approach acknowledges that the fiduciary cannot reasonably be expected to distribute information to a beneficiary until a reasonable time after the fiduciary receives actual knowledge that a beneficiary has become entitled to make investment decisions (*e.g.*, as a result of the death of the participant) and of the identity and location of the beneficiary involved.

2. TIMING AND STANDARD APPLICABLE TO NOTICE OF MATERIAL CHANGE

Summary

As described above, the Proposed Regulation would require that, on or before the date of plan eligibility and annually thereafter, a fiduciary provide general investment instructions and voting rights information. Specifically, that information includes: (A) an explanation of the ability to give investment instructions; (B) an explanation of limitations on those instructions; (C) a description or reference to provisions relating to exercise of voting, tender, or similar rights; (D) identification of any designated investment alternatives; and (E) identification of any designated investment managers.¹³ In addition, the Proposed Regulation would require that, not later than 30 days after the date any “material change” to any of those information items is adopted, each participant and beneficiary receive a description of the change.¹⁴

Recommendation

We recommend that the regulation, when finalized, do the following:

- (a) Require that notice of a material change to the information provided in the initial and annual notices be provided by the latest of (i) 30 days after the change is adopted, (ii) 30 days prior to the effective date of the change, or (iii) as soon as practicable, but not later than 30 days, after the fiduciary responsible for notifying participants has been provided notice of the change; and
- (b) Clarify, by way of examples and a list of principles or factors to be considered, how to determine when such a change is “material”; and clarify that the notice of material change is required to be given only to: (i) participants with the authority to direct investments in the plan; and (ii) beneficiaries who have received the right to make investment decisions with respect to an individual account under the plan.

¹³ Prop. Reg. § 2550.404a-5(c)(1)(i), 73 Fed. Reg. 43014, 43039 (July 23, 2008).

¹⁴ Prop. Reg. § 2550.404a-5(c)(1)(ii), 73 Fed. Reg. 43014, 43039 (July 23, 2008).

Explanation

Effective Date of Change. The notice deadline would be more consistent with the purpose behind the notice requirement if it took into account the *effective* date rather than the adoption date of a material change. We appreciate the Preamble's stated goal of increasing the likelihood that participants and beneficiaries will receive notice in advance of changes becoming effective, thereby putting those individuals in a better position to consider such changes.¹⁵ We urge the Department to adopt a final rule that addresses those goals, but also recognizes and balances the practicalities faced by plan fiduciaries of (i) learning of a material change, (ii) communicating that change to participants and beneficiaries, and (iii) communicating the change at a time when the individual is most likely to make a decision that could be affected by the material change. Often, a plan change is adopted far in advance of its effective date. In our view, a notice of the change may be ineffective or, at best, less effective, if provided far in advance of the effective date of the material change. Additionally, a fiduciary may not always receive notice of a change within 30 days of its adoption when a third party – such as a fund manager – unilaterally adopts the change. It is more likely that a third party would focus on informing a fiduciary in advance of the date the change becomes effective rather than when the change is adopted. Finally, the date of “adoption” may not be as concise and objective as the effective date of the change. For example, is an increase in redemption fees adopted when the investment company or fund manager approves the change? Or is it adopted when a plan's fiduciaries become aware of the change? Or is it adopted only when the fiduciaries make an affirmative decision to continue to offer the fund as an investment option despite the higher redemption fees? Other ambiguities result when a change is subject to review and action by more than one internal committee or board. For these reasons, we recommend that the final regulation include an element which focuses on when a material change becomes *effective*.

Moreover, we recommend that the plan administrator (or other fiduciary responsible for providing notice to participants) have a brief period to disclose changes that may become effective immediately or of which the plan administrator is not timely informed. We believe that in such cases, the plan administrator should provide notice as soon as reasonably practicable, but in any event within a period of 30 days, after being notified of the change. This approach would offer a reasonable and realistic amount of time to disclose the change, yet still protect the interest of timely providing the information to participants and beneficiaries.

“Material Change.” In addition, we recommend that the regulation, when finalized, provide specific guidance regarding whether a change is “material.” That guidance would be most helpful as a combination of: (i) examples illustrating changes with respect to each of the five informational items that would or would not be sufficient to trigger the notice requirement; and (ii) an expression of principles or factors to be considered in determining whether a change is “material.” In the absence of such guidance, many fiduciaries may have no choice but to incur greater costs by compensating record keepers and other plan service providers to monitor multiple investment providers closely and to analyze the relative import of even the smallest of changes to determine whether a change rises to a “material” level -- costs which would likely be passed on to participants in many instances. We recognize that materiality often may involve a facts-and-circumstances analysis, but recommend that the final regulation provide examples of

¹⁵ 73 Fed. Reg. 43014, 43015 (July 23, 2008).

changes to the items already listed in Proposed Regulation § 2550.404a-5(c)(1)(i)(A) through (E) that would or would not be of sufficient magnitude to be “material” in this context and indicate principles or factors to be considered in determining “materiality” in this context.

Participants and Beneficiaries. The requirement to provide notice of a material change to “each participant and beneficiary” raises issues similar to those raised with respect to the initial notices described in Part II.A.3. above. Accordingly, we recommend that the “material change” notice be required only for participants and beneficiaries who may be affected by the change. This would exclude employees who have not received the information listed in Proposed Regulation § 2550.404a-5(c)(1)(i)(A) through (E), employees who are no longer actively participating in the plan, and beneficiaries who have not yet become entitled to make investment or other account management decisions under the plan.

3. DISCLOSURE OF INVESTMENT RELATED INFORMATION – SCOPE OF SPECIFIED FIXED-RETURN INVESTMENTS

Summary

The Proposed Regulation has precise disclosure requirements regarding performance data for designated investment alternatives with fixed investment returns, which differ from the more extensive disclosure requirements regarding performance data, benchmarks and fee and expense information for designated investment alternatives with respect to which the return is not fixed.¹⁶

Recommendation

We recommend that the regulation, when finalized, clarify that a designated investment alternative may be treated as having a fixed investment return even if the interest rate for the fixed rate of return may be reset by the insurance company or other financial providers or guarantors at periodic intervals (*e.g.*, quarterly).

Explanation

We recommend that an investment alternative under which the rate of return is fixed for a specified period, but which may be reset for a future specified period, come within the meaning of a “fixed return investment” for purposes of the required disclosures. We recommend that the right to reset a fixed rate of return periodically thereafter not result in the investment being classified as one without a fixed return. These investment alternatives, such as guaranteed investment contracts or stable value funds backed by guaranteed investment contracts, offer a guaranteed rate of return, as well as a guarantee of the principal, during the specified period. As the Department notes in the Preamble,¹⁷ the most material information for the participant in this regard is the fixed rate of return and the applicable period for which that rate is guaranteed. We recommend that the final regulation make clear that investment alternatives with fixed interest rates that are reset periodically are “fixed return investments” that are not subject to the disclosure of fees, total operating expenses, or benchmarking (although the rate of return and the period for which such rate will remain fixed must be disclosed). Moreover, we recommend the

¹⁶ Prop. Reg. § 2550.404a-5(d)(1)(ii)-(iv), 73 Fed. Reg. 43014, 43040 (July 23, 2008).

¹⁷ 73 Fed. Reg. 43014, 43017 (July 23, 2008).

final regulation clarify that, to the extent expenses are incurred with respect to the general account underlying a guaranteed investment contract offered to plan participants, the existence of those expenses and deductions and the nature of how they are calculated be disclosed, but that the amount of the expenses and deductions need not be separately disclosed to participants, since they are not deducted directly from the participant's actual account balances. Instead, we recommend the final regulation provide that any actual deduction to a participant's account in connection with the fixed income investment (*e.g.*, deferred sales charges under group annuity contracts) should only be disclosed to the extent relevant to the participant. To the extent that expenses or fees associated with a fixed return investment such as applicable sales loads, redemption fees, or surrender charges (*e.g.*, market value adjustments on early withdrawals) are charged against a participant's account, the actual amount of those expenses or fees would be disclosed at the time that such amounts are deducted from the participant's accounts.

4. DISCLOSURE OF INVESTMENT RELATED INFORMATION – SCOPE OF DESIGNATED INVESTMENT FUNDS

Summary

The Proposed Regulation requires that information regarding investment expenses be provided with respect to “designated investment alternatives,” which generally are defined as “any investment alternative designated by the plan”¹⁸ In addition, the Proposed Regulation states that the term “shall not include ‘brokerage windows,’ ‘self-directed brokerage accounts,’ or similar plan arrangements that enable participants and beneficiaries to select investments beyond those designated by the plan.”¹⁹ This definition is helpful, but does not expressly address mutual fund windows, another arrangement established by third-party providers for offering participants access to a large number of funds.

Recommendation

We recommend that the regulation, when finalized, define “designated investment alternative” to expressly exclude not only brokerage windows and brokerage accounts, but also mutual fund windows.

Explanation

We commend the Department for recognizing that if a plan merely provides access to underlying investments through a brokerage window or similar arrangement, it would be impractical and inappropriate for the plan administrator, plan sponsor, or trustee to be responsible for assembling and providing the investment return and expense information for the all of the underlying investments that would otherwise be required by the Proposed Regulation. In the case of a full brokerage window, attempting to do so would require the plan administrator or its delegate to identify and provide information on virtually all of the investments available in the entire world – clearly an impossibility. While a brokerage window represents the extreme end of the spectrum, similar practical difficulties exist with respect to other arrangements, such as mutual fund windows. For example, many mutual fund windows provide access to literally

¹⁸ Prop. Reg. § 2550.404a-5(d), 73 Fed. Reg. 43014, 43039 (July 23, 2008).

¹⁹ Prop. Reg. § 2550.404a-5(h), 73 Fed. Reg. 43014, 43041 (July 23, 2008).

thousands of mutual funds. Unlike brokerage accounts, the alternatives are limited only to mutual funds (as opposed to investments in specific underlying stocks or bonds). Like brokerage accounts, however, the underlying investments offered through the windows typically are arranged by a third-party provider, are not subject to individualized selection by the plan sponsor, administrator, or trustee, and often are very numerous.

As currently drafted, the definition of “designated investment alternative” appears to exclude mutual fund windows. To avoid any confusion, it would be helpful for the final regulation to list mutual fund windows specifically as an excluded arrangement. In addition, it would be helpful if the definition elaborated on the phrase “investment alternative designated by the plan,” by indicating that designated investment alternatives extend only to investments that are individually selected by the plan sponsor, plan administrator, or trustee for inclusion in the list of investments offered to plan participants, and not to arrangements established by a third-party plan provider in order to provide participants with a vehicle for accessing a significant number of investment alternatives, beyond such individually selected funds.

5. DISCLOSURE OF ADMINISTRATIVE EXPENSE INFORMATION IN EITHER PERCENTAGE OR DOLLAR TERMS

Summary

The Proposed Regulation requires disclosure to each participant, on at least a quarterly basis, of the dollar amount actually charged during the preceding quarter to the participant’s account for plan administrative services (*e.g.*, legal, accounting, recordkeeping), to the extent not otherwise included in investment related fees and expenses.²⁰

Recommendation

We recommend that the regulation, when finalized, permit the disclosure of fees charged to a participant’s account for plan administrative services (*e.g.*, legal, accounting, recordkeeping) to be expressed in either a dollar amount or as a percentage of the account.

Explanation

The Proposed Regulation expressly acknowledges that administrative expenses may be charged to participant accounts on a pro rata, per capita, or other basis. Moreover, “operating expenses” related to an investment are required to be disclosed as a percentage. In our view, requiring disclosure in dollar terms in some cases and in percentage terms in others adds complexity and potential confusion for both plan fiduciaries and participants, and yields inconsistent treatment depending on the manner in which plan services and investment arrangements are structured. As a result, it would be more appropriate to permit the disclosure of plan administrative expenses to be expressed, at the fiduciaries’ option, as a percentage, instead of in dollar terms.

We believe that disclosure of “operating expenses” related to an investment as a percentage is helpful because it allows participants to rapidly assess the impact of the expenses

²⁰ Prop. Reg. § 2550.404a-5(c)(2)(ii)(A) and -5(d)(i)(iv)(B), 73 Fed. Reg. 43014, 43039-40 (July 23, 2008).

on the investment return, which is also set forth as a percentage. For the same reason, disclosure of plan administrative services as a percentage of the account could also be advantageous for plan participants, especially with respect to fees that are charged on pro rata basis. In such cases, it would also be administratively simpler for the disclosure to be provided in percentage terms.

In some cases, it is not clear which expenses fall into which category. For example, where recordkeeping services are charged to participants by assessing a number of basis points on the return of each investment alternative, the question is whether the expense is properly treated as an operating expense related to an investment, which must be disclosed as a percentage, or as a plan administrative expense, which should not be included in the investment expense disclosure but instead stated in dollar terms. While not entirely clear, it seems that the expense is a plan administrative expense because the fee is being imposed at a plan level.

In contrast, where the services are provided in a bundled arrangement in which the third-party provider essentially funds the legal, recordkeeping, and related services through a fee wrapped into the investment charges, the question is whether the amounts are required to be considered as operating expenses related to an investment, which may only be disclosed as a percentage. Again, it seems as though this probably is the intended construction because the fee is being imposed by a third party and in a manner that it is automatically wrapped into the investment expense. In that event, the result for participants, plan sponsors, and administrators, may be inconsistent because it depends upon whether the approach is bundled or unbundled. To avoid mandating this inconsistent result, we recommend that the final regulation permit disclosure of plan administrative expenses to be stated as a percentage of the account.

6. DISCLOSURE OF EXPENSES FOR SERVICES TO INDIVIDUAL PARTICIPANTS

Summary

In addition to a disclosure of fees relating to investments, the Proposed Regulation requires disclosure to each participant and beneficiary of other fees for services provided on an individual, rather than plan, basis. Examples of such fees include fees attendant to processing plan loans or QDROs. This disclosure, on a quarterly basis, must include the dollar amount actually charged during the preceding quarter to the participant's account for such services.²¹

Recommendation

We recommend that the regulation, when finalized, delete the requirement to disclose fees for services provided on an individual basis (*e.g.*, loan processing fees or QDROs) that do not relate to participant investment decisions.

Explanation

It is common for plan fiduciaries to disclose information regarding fees assessed for processing plan loans or QDROs, or similar fees for services, provided to an individual participant. Loan fees or fees relating to QDROs result directly from the participant's individual

²¹ Prop. Reg. § 2550.404a-5(c)(3), 73 Fed. Reg. 43014, 43039 (July 23, 2008).

decision to apply for a plan loan or to divide the plan benefit in a divorce. These types of fees generally do not directly relate to a participant's investment decisions. Loan fees and QDRO processing fees would not ordinarily have any bearing on which of the designated investment alternatives the participant may select.²² To the contrary, information regarding such fees would seem as material to participants in plans which do not provide participant investment discretion as in plans which do.

Consequently, we recommend that the fee disclosure requirements not apply to loan or QDRO processing fees or other similar fees for individual services unrelated to the investment decisions. An exception exists for fees related to provision of investment advice. In order to determine whether to access advice in selecting investments, a participant should be able to weigh the cost of the advice versus the potential benefit of improved investment performance.

To the extent that the Department determines that participants should be provided information regarding loan or QDRO processing fees (or other similar fees for individual services which are not investment-related), it might be preferable for such a requirement to be included in separate regulations, applicable to defined contribution plans or pension plans, generally. For example, regulations regarding account statements and summary plan descriptions could include disclosure requirements related to these types of fees.

²² Although a plan loan is, in a sense, a plan investment, it is not an investment option within the normal meaning of the term. Participants typically seek plan loans in order to access funds to cover their immediate financial needs, not because they would prefer their retirement plan assets to be invested in a personal note rather than in one or more of the plan's designated investment alternatives.