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Fee Disclosure for Self-Directed Multiemployer Defined Contribution Plans

Sponsors of private sector defined contribution (DC) plans that offer participant-directed investments, including Section 401(k) plans, should begin to prepare for the additional transparency that will be required when the proposed regulation on participant fee disclosures that the Department of Labor (DOL) issued this past summer is made final. In addition, the DOL has issued a proposed regulation on disclosure of information to plan sponsors. It is still unclear when the final versions of these proposed regulations will be issued.[1]

It is, however, very clear that plan sponsors are being held to a higher standard of due diligence in ongoing operations of DC plans and are well advised to secure and analyze critical information now in fulfillment of this obligation. In fact, the proposed DOL regulations should be taken seriously as a *minimum* indicator because the proposals (especially the provider fee disclosure proposals) have been criticized by participant groups and other commentators, including influential Congressional Democrats, for not disclosing enough.[2] This *Segal Advisory* presents an overview of the implications and notes steps that plan sponsors may want to take now in order to ensure they are prepared to comply with the final regulations when they are issued.

What Are the Implications?

The important legal innovation in the proposed participant-disclosure regulation was the DOL view that making detailed fee disclosures is a basic fiduciary requirement in the case of a participant-directed plan, not just a requirement for plans to fit within the fiduciary shelter of ERISA's §404(c). Independent of the regulations, that position will promote more disclosure. The new disclosure requirements are likely to affect plan sponsors in the following ways:

- ***Collection and Review of Information from Service Providers*** Plan sponsors would be required to secure full and complete information concerning all of the administrative and investment-related fees charged to their plan.[3] As part of their fiduciary duties under ERISA, the responsible plan fiduciaries would be required to conduct an objective review of this information to, among other things, analyze each vendor's aggregate compensation and fees from the plan for reasonableness and potential conflicts of interest, in addition to assessing the qualifications of the service provider and the nature and quality of the services that will be provided in light of what the plan is paying for them.
- ***Revised Service Contracts*** Service contracts would need to be revised to require the service provider to provide the information that the sponsor must disclose, and to update it with any material changes to the required information. This would include the obligation to provide information necessary for completion of Form 5500 and information necessary for the plan sponsor to comply with disclosure obligations to plan participants and beneficiaries.
- ***Disclosure to Plan Participants*** Plan sponsors would be required to provide general plan and administrative expense information and individual expense information, in an easy-to-read comparative format, on or before the date of eligibility to participate in the plan and at least annually thereafter. In addition, the actual dollar amounts charged to each account would have to be disclosed at least quarterly, with the individual benefit statement.

[1] The regulation on fee disclosure to participants had been scheduled to take effect for plan years beginning on or after January 1, 2009. The regulation on disclosure of information to plan sponsors will take effect 90 days after publication in the *Federal Register*. Neither final regulation had been published by the end of the Bush Administration. As a result, both sets of rules will be reviewed by the new Labor Department leadership, so neither will take effect until later in 2009 or 2010. An online supplement to this *Segal Advisory* summarizing what the proposed regulations would require is available on the following page of the Segal Advisors Web site: http://www.segaladvisors.com/publications/feb09segaladvisorysupp.pdf

[2] Representative George Miller (D-CA), chair of the House Committee on Education and Labor, proposed legislation last year (HR 3185) that would set additional and stricter ground rules, going beyond the requirements of the proposed regulations. President Obama's campaign agenda included increasing disclosure on plan fees and investments.

[3] For more information on DC plan fee transparency, see the April 2007 *Segal Advisory*, which is available on the following page of Segal Advisors' Web site: http://www.segaladvisors.com/publications/april07segaladvisory.pdf

- ***Plan Oversight*** Receipt and distribution of the additional information would not relieve plan fiduciaries of the requirement to monitor service arrangements and the performance of service providers. All of the proposed guidance emphasizes the basic proposition that participant disclosure does not relieve a fiduciary from the responsibility to prudently select and monitor investment managers and investment alternatives offered.

What Can Plan Sponsors Do Now to Get Ready?

Plan sponsors may want to prepare to comply by doing some or all of the following:

- ***Review current service contracts to evaluate current service offerings, performance guarantees and expense.*** This review should be conducted in the context of service objectives and the plan characteristics influencing market-related benchmarks.
- ***Review current investment options and their fee structures and risk profiles, and benchmark their performance.*** A market-based analysis of all investment related fees should be conducted to assure that the plan has access to each fund option at the lowest cost available, recognizing plan size and characteristics.
- ***Consider broadening/updating investment/distribution options.*** Given the increasing importance of DC plans as a component of wealth accumulation and retirement planning, plan sponsors should reexamine the array of investment and distribution alternatives being offered. New options might be added and/or redundant ones eliminated with the goal of making it easier for participants to choose. In addition, a growing number of investment and distribution alternatives have been introduced to the market over the last several years (*i.e.*, managed accounts, brokerage accounts, annuity type accumulation and distribution vehicles), a trend that is expected to continue. While it is appropriate for plan sponsors to consider these alternatives, due diligence must be conducted to assure that maximum value is provided for plan participants.
- ***Install procedures to assure adequate oversight of investment managers.*** The legislative focus on participant fee disclosure, the proposed DOL regulations, Securities and Exchange Commission investigations associated with investment fund operations, and a growing number of class action lawsuits concerning administrative and investment-related fees have placed greater attention on the role of the plan fiduciaries in overseeing the ongoing operations of DC plans. Most professionals advise that due diligence include the formation of an administrative committee, an investment committee or subcommittee, with support from an expert, independent third party.
- ***Develop a communications strategy.*** The proposed regulation on participant fee disclosures provides an opportunity for plan sponsors to develop a communications plan for participant outreach to educate and promote the value of the total retirement program: the defined benefit plan, the DC plan and retiree health coverage. It is a good time to reinforce the retirement plan philosophy, plan details *and* to encourage personal savings as a key component to meeting long-term financial objectives. While the general information provided by the investment firm or recordkeeper can provide retirement basics, a program of customized, audience-targeted communications helps participants to plan for their future financial security at various life stages. It will enhance the value of your retirement program for participants, provide them with the knowledge and tools to meet their financial goals and demonstrate plan sponsor due diligence.

Conclusion

Sponsors of DC plans that offer participant-directed investments should take steps now to prepare to comply with the DOL's final regulations on participant fee disclosures soon after they are published. As noted in this *Segal Advisory*, compliance with the final guidance will have numerous implications for plan sponsors.

As with all issues involving the interpretation or application of laws and regulations, trustees of multiemployer DC plans should rely on their fund counsel for authoritative advice on their fiduciary responsibilities. To discuss reviewing DC plan investment options and the steps described above, contact your Segal Advisors consultant or the nearest Segal Advisors office.

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