



THE PROFIT SHARING AND 401(k) ADVOCATE ♦ SHARING THE COMMITMENT SINCE 1947
20 N Wacker Drive ♦ Suite 3700 ♦ Chicago, IL 60606 ♦ 312.419.1863 ♦ Fax: 312.419.1864 ♦ www.pzca.org

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submitted electronically
e-ori@dol.gov

Office of Regulations and Interpretations
Employee Benefits Security Administration
United States Department of Labor

ATTN: FEE DISCLOSURE RFI

RESPONSE OF THE
PROFIT SHARING / 401K COUNCIL OF AMERICA
TO THE REQUEST FOR INFORMATION ON FEE AND EXPENSE DISCLOSURE TO
PARTICIPANTS IN INDIVIDUAL ACCOUNT PLANS

The Profit Sharing / 401k Council of America (PSCA) is pleased to respond to the Department's Request for Information on Fee and Expense Disclosure to Participants in Individual Account Plans. PSCA, established in 1947, is a national non-profit association of 1,200 companies and their 6 million employees that advocates increased retirement security through profit sharing, 401(k), and related defined contribution programs to federal policymakers and provides practical assistance on profit sharing and 401(k) plan design, administration, investment, compliance, and communication to its members. PSCA's services are tailored to meet the needs of both large and small companies, with members ranging in size from Fortune 100 firms to small entrepreneurial businesses.

We will begin our response with three general principles that we believe are critical to any participant disclosure regime:

Simplicity - Employees face important decisions when contemplating their participation in a participant directed individual account plan. First, should I participate in this plan? Secondly, what plan investment alternative should I select? These decisions should consider two types of plan fees – the fees for general plan costs and specific procedures that are incurred as the result of plan participation, and the specific fees associated with the investment allocation decision. Only fees paid by the participant are relevant. Precisely calculating plan fees paid by an employer may be impossible. There is no value in breaking the fees down into detailed components. Simplicity is critical to cost minimization.

Sensitivity to costs - Fee disclosure creates costs that will be borne by participants, either directly as an assessment against plan assets or indirectly as an element in employers' overall compensation structures. Obviously, the cost of disclosure varies proportionally with complexity. Fee disclosures should be based on "snap-shot" calculations and the use of estimates and examples. The ability to provide disclosure electronically is critical to minimizing costs.

Flexibility – How fees are disclosed to participants is critical to a successful and cost-effective disclosure program. Only employers, working with service providers, have the insight necessary to craft disclosure programs that will best serve their employees. Employers should be free to decide whether or not to combine fee disclosure with other communications, such as a benefit statement or annual report.

DISCUSSION

DISCLOSURE OF INFORMATION RELATING TO PLAN INVESTMENTS

Content and format of disclosure

Fee disclosure without context has the potential for dangerous consequences because participants may make decisions based solely on fees. PSCA supports the findings of the ERISA Advisory Council's Working Group on Prudent Investment Process that all participants be provided the following information:

- Types of investments
- Investment objectives
- Principal risks
- Annual fees
- Historical performance
- Identity of investment advisor

This information should be provided to all participants in a participant directed individual account plan, regardless of the plan's status under section 404(c), upon reaching eligibility to participate in the plan.

The named fiduciary should be responsible for this disclosure. That person must rely on information from various service providers in order to meet this responsibility. Similar to the proposed revision to the Form 5500, the Department should provide a mechanism for reporting any person or organization that fails to provide the needed information to the named fiduciary in a timely manner.

Currently, there is a wide variance in the disclosure of fee information to plan participants beyond legally required disclosures such as those incorporated in section 404(c). Some plans voluntarily provide all the information listed above on a quarterly basis or in real time via internet access. Virtually all participant directed plans provide significant material about plan investment alternatives upon reaching plan eligibility or at the time of hire.

The fee data should be presented as one aggregate figure. There is no value - and significant cost - in providing the components of the fee calculation to participants. It is not a factor in their decision process. In addition to investment management fees that are typically reported as a ratio of account assets and may contain component costs, other special fees such as redemption fees, brokerage window charges, account management fees, sales loads, termination fees, etc., should be reported.

Fee disclosures should be based on a "snap-shot" calculation at a specific point in time, such as at the beginning of the plan year or some other arbitrary date. If any changes in any factor occur for any investment, the aggregate information should be redistributed, but only on an annual basis. Fees should be expressed as a percentage of account assets and also recalculated in dollars; but the use of estimated account balances should be permitted. For example, hypothetical account balances of \$10,000, \$50,000, and \$100,000 might be utilized.

Employees have no need to consider employer-paid fees because they do not impact a participant's decision making process when considering investment alternatives. PSCA urges the Department to avoid requiring the disclosure of any fees not paid with plan assets; something never before required under ERISA. Employers, particularly large employers, frequently pay for a significant portion of plan costs with company assets rather than with plan assets. Some employers voluntarily disclose some of this information to plan participants, but it may be impossible to precisely report all plan fees paid with employer assets, such as allocation of employee time and corporate overhead costs. A requirement to disclose employer-paid fees will inevitably lead to specific accounting rules with associated costs, not to mention new compliance costs and potential liabilities. Disclosure of employer-paid expenses could hamper employers' efforts to obtain the lowest costs for plan services. This will have the unintended consequence of discouraging employers from paying plan-related fees and result in the increased use of participants' assets to pay plan expenses.

PSCA encourages the use of concise summary materials for any disclosure requirements. To the degree possible, employees should be provided information that facilitates comparison of the investment alternatives. For plans with a small number of investments it may be possible to create a manageable side-by-side chart that captures the needed information for each alternative. However, as plan alternatives increase, the difficulties in creating a readable chart multiply.

PSCA does not support a mandate to conduct and disclose to participants any investment or fee benchmarking requirements other than those required for investments pursuant to SEC or other regulatory agency rules. Of course, named fiduciaries must ensure that any costs paid with plan assets are reasonable.

Mandatory fee benchmarking disclosure should be avoided because to do so in a manner that reflects a particular plan will result in significant costs that will be borne by participants. Broad benchmarking criteria, such as one based solely on the number of participants, will not produce accurate information because it ignores many other factors, including total plan assets, average account assets, and the limitless variety of individual plan design features.

Electronic communication

Electronic communication, especially the utilization of interactive internet-based systems, dramatically improves the ability to provide extensive, individualized, and timely disclosure at a cost far below a paper-based system. Such systems permit broad comparisons with the availability to "click-down" for more detailed information. Individual plan investments might be able to be selected for comparisons as a participant narrows their field of options when selecting their own plan investments.

The Department has published guidance on the use of electronic communication that reflects that some participants and beneficiaries that do not have access to computers will require disclosure in a paper form. PSCA recognizes the need for paper disclosures, but we cannot emphasize enough the additional cost and reduced flexibility that results from a paper-based system. Under current rules, it's likely that every plan will have to retain a paper-based system for some of its participants and/or beneficiaries for many years. The need to provide paper-based material to some participants could have the perverse affect of limiting the willingness of plan sponsors to offer the optimal electronic system because the cost of "reproducing" the system for paper-based delivery is unreasonably high. It is unfortunate that as we move to paperless communication the needs of a minority may inhibit the willingness to provide advanced systems to participants. We urge the Department to be cognizant of this problem as it formulates its fee disclosure

policies. A solution is to permit separate levels of disclosure for participants served by electronic and paper-based fee disclosure systems.

For example, we applaud the Department's action in Field Assistance Bulletin 2006-03 relating to benefit statements under the Pension Protection Act. The Bulletin includes a finding that the Department's guidelines under 2520.104b-1 are not the exclusive means by which plan sponsors could furnish a benefit statement, noting the Department of Treasury's guidance on electronic communication. The Bulletin also provides that plans that provide participants continuous access to benefit statement information through one or more a secure websites could satisfy the quarterly disclosure requirement by furnishing an original notice of the availability of the information and thereafter provide only an annual notice. Finally, the Bulletin, addressing the Pension Protection Act requirement for the direction of participants to a Department of Labor website for sources of information on individual investing and diversification, does not include any requirement to provide the information in paper form. We applaud the Department's flexibility that is demonstrated in Field Assistance Bulletin 2006-03 and urge that it be extended to this endeavor.

Burdens and Costs

All regulated activities result in additional costs, even when an activity is already conducted voluntarily. In the present case, an accurate assessment of costs is dependent on further details of how much information will be required to be disclosed and in what manner. We have noted several factors that will influence costs – the ability to use “snap-shots”, estimates, and examples rather than precise calculations; the degree of flexibility in how to provide the disclosure; and the use of electronic systems are three critical factors. In many situations, the information needed to provide disclosure will emanate from many different sources and have to be organized and presented in a uniform manner. This, in itself, will constitute a considerable cost burden.

Changes to section 404(c)

Disclosures discussed pursuant to this Request for Information duplicate many of the disclosure requirements required by section 404(c). Those requirements under section 404(c) should be deemed to be satisfied in regards to applicable disclosures that are made pursuant to this comment letter. The requirement in section 2550-404c-1(b)(2)(viii) regarding disclosures immediately following an initial investment in an investment subject to the Securities Act of 1933 should be deemed to be satisfied if the required information is provided upon eligibility to participate in the plan and the required annual disclosure recommended in this comment letter is provided.

Education

Fee disclosure without context has the potential for dangerous consequences because participants may make decisions based solely on fees. As already noted, PSCA favors fee disclosure that is coupled with a description of the investment, the investment strategy, and historical performance. While the majority of plan participants receive various levels of education about their plan investment alternatives and the basics of investing, PSCA does not support a new mandate to provide education because it will present additional requirements that will discourage some employers, especially small employers, from offering a retirement plan to their workers.

A mandate is not required. In addition to employers' voluntary actions, the Pension Protection Act requires that participants be directed to the DOL website, <http://www.dol.gov/ebsa/investing.html>, containing information on investment and diversification. The website currently includes comprehensive materials on investing and the Department's “A Look at 401(k) Plan Fees,” in addition to links to other

sources of information. PSCA commends the Department for the quality of the materials that are offered on this website.

DISCLOSURE OF INFORMATION RELATING TO PLAN AND INDIVIDUAL ACCOUNT ADMINISTRATIVE FEES AND EXPENSES

PSCA supports the disclosure of plan administrative costs to participants in a manner consistent with our comments on investment-related fees. Only fees paid with plan assets should be required to be disclosed and there should not be a requirement to report the components of the overall fee except for specific procedures such as brokerage windows, loans, and QDROs. The current voluntary practices for disclosure of fees varies widely, as we discussed earlier in our comments. Fee disclosure for general plan expenses should include a description of loan fees, QDRO assessment policies, etc.

GENERAL MATTERS

The effect of increased fee disclosure to participants on participants, plan sponsors and vendors

In our September 2004 testimony before the ERISA Advisory Council Working Group on Fees and Related Disclosures to Participants, PSCA noted the significant requirements for plan sponsors to ensure that any fees paid with plan assets are reasonable. When coupled with the requirement that plan investments be prudent vehicles for retirement savings, plan participants receive valuable assistance not offered to “retail” investors. We noted that these requirements on plan sponsors mitigate the need for major changes in fee disclosure to participants. At the same time, we did recommend some significant changes. In companion testimony relating to fee disclosure to plan sponsors, we advocated significant improvements, many of which are being implemented by the Department. We continue to believe that an informed and educated plan sponsor is the best assurance that participants pay only reasonable fees in their defined contribution plan.

We feared then, and still do, that over-reliance on fees by participants could result in adverse investment choices. For example, if employees were to make an investment decision based solely on fees, they would select employer securities because that investment, by law, cannot charge an investment management fee. Other investments with historically low fees are stable value products and passive investments. In all these examples there are major factors to consider in addition to fees to determine a proper investment allocation. In fact, many PSCA members have taken measures to limit investments in employer securities and the Pension Protection Act of 2006 provides for a special notice on the importance of diversification of plan investments.

Nevertheless, we recognize that significant changes in participant fee disclosure are in the wings. We believe that the structured approach taken by the Department is the best mechanism to avoid unintended consequences and to balance the costs, paid directly or indirectly by participants, with the benefits of increased disclosure. This Request for Information is affirmation of our belief that the Department is taking the cautious measured approach that is critical for this complicated issue.

PSCA does not expect that changes in participant disclosure will affect vendors beyond those who will incur costs (that will be passed on to plans) if they are tasked with assisting providers with the actual disclosure. However, the expected changes and increased transparency in disclosures to plan sponsors that will result from other Department of Labor initiatives should have a positive effect on the quality and costs of plan investment alternatives that are offered to participants.

For plan sponsors, increased fee disclosure to participants will result in new requirements and additional costs that will be passed on to employees. That is why it is critical to balance the value of increased disclosure against the benefit.

Thank you for considering these comments. Please feel free to contact me at 312-419-1864 if you have any questions or if I can be of any assistance.

Sincerely,

David L. Wray