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BARCLAYS GLOBAL INVESTORS

VIA ELECTRONIC FILING

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Office of Rules and Interpretations
Employee Benefits Security Administration
Room N-5665
U.S. Department of Labor
200 Constitution Ave., NW
Washington, DC 20210
Attention: **408(b) (2) Amendment**

Ladies and Gentlemen:

Barclays Global Investors ("BGI") is pleased to offer its comments regarding the proposed rule that will redefine what constitutes a "reasonable contract or arrangement" for purposes of the statutory exemption provided by Section 408(b) (2) of the Employee Retirement Income Security Act of 1974 ("ERISA").

BGI is one of the world's largest institutional investment managers, and the world's largest provider of structured investment strategies such as indexing, tactical asset allocation and quantitative active strategies. At December 31, 2007 BGI managed over USD 2 trillion, of which approximately USD 250 billion represents defined contribution plan assets. BGI is also the largest manager of ERISA assets. Headquartered in San Francisco, BGI is a subsidiary of Barclays Bank PLC, one of the world's leading diversified financial services companies.

From its founding, BGI has focused on providing low cost investment solutions for its clients. For both its defined contribution and defined benefit plan clients, it acts solely as an investment manager. Neither BGI nor any of its affiliates currently act as master trustee, provide recordkeeping services, operate a retail brokerage, or offer individual retirement accounts. It does act as a collective fund trustee and as a named custodian but custody operations, fund accounting and related services are provided by third parties.

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Associate of Barclays Global Investors Services (BGIS), member NASD/SIPC. Certain funds are distributed by SEI Investments Distribution Co. (SEI). Securities are marketed by BGIS, a subsidiary of Barclays Global Investors, N.A., none of which is affiliated with SEI.

Introduction

BGI is pleased to see the recent focus of EBSA, other federal regulators, Congress and others on the changes that have occurred in recent years in the way in which services are provided to employee benefit plans and in the way service providers are compensated. We agree that the complexity of these changes has made it more difficult for plan sponsors and fiduciaries to understand what the plan actually pays for specific services and where the potential exists for conflicts. This is particularly so for defined contribution plans, where over the last decade the costs associated with managing and maintaining the plan have increasingly been shifted to plan participants, and concomitantly the use of "bundled" service providers has also increased.

Studies have shown that, on average, defined benefit plan performance exceeds the defined contribution plan by 200 basis points. "Mind the Gap", BGI Investment Insights (Waring, Siegal, Kohn 2004). While there are a number of reasons for this, a significant driver for this performance gap is the difference in the fees and expenses incurred by DC plans as compared to DB plans.[1] And underlying this "cost gap" is the difficulty that plan sponsors encounter in the DC marketplace in obtaining comparable information on the charges to be incurred for the same or similar services.

BGI supports the Department's efforts to bring more transparency to the market for retirement services. We agree that greater understanding of the fees paid, directly or indirectly, by employee benefit plans will increase efficiency and competition in the market and thus generate benefits to plans and their participants. Transparency is necessary but not sufficient, however. Any disclosure regime also needs to provide the appropriate level of information so as not to be overly burdensome for the recipient in both the collection and comparison of information. There are many ways in which the proposed rule can be improved to achieve this goal, many of which are being addressed in comment letters from others in the industry. We limit our comments here to a few of the key ways in which the proposed rule can be improved to meet these objectives. Additionally, BGI's comments primarily will focus on the issues raised in applying the proposed rule to defined contribution plans and their service providers.

Coordination with Form 5500

BGI appreciates the considerable effort undertaken by the Department in coordinating the compensation disclosures in the proposed rule with the annual Form 5500.[2] The requirement expressed in the proposal that a service provider furnish all required information before the contract or arrangement is entered into will assist plan fiduciaries at the time most critical to decision making as to the selection and retention of a service provider (as compared to the Form 5500 'after the fact' process).

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[1] The two largest cost categories for DC plans are administration and recordkeeping and investment management. DB plans generally do not have substantial administration and recordkeeping needs (as compared to DC plans), and thus the difference in costs between DC and DB is attributable to lower administration costs but also is directly related to the ability of DB plans to negotiate lower investment management fees.

[2] As the Department clarifies matters under Form 5500 from time to time, it will be important to maintain a similar linkage in the regulations and interpretations under Section 408(b) (2).

The Form 5500 also provides a benefit that is lacking in the proposed rule—Schedule C of the Form 5500 provides generally for a uniform basis of compensation reporting. The proposed rule does not prescribe the manner in which disclosure should be presented to the plan fiduciary, and the preamble indicates that all the required disclosures need not be in the same documents, and indeed, could be in separate documents from separate sources, with the 'expectation' that the service provider will clearly describe these materials and explain the information. This places a large burden on the plan fiduciary, especially if it is evaluating proposals for similar services from more than one potential service provider, as it may be confronted with reviewing different documents/multiple sources in order to ascertain compensation differences.[3] A request to revise a service proposal could result in the plan fiduciary being presented with another set of documents that incorporate the required information.

BGI believes that the Department should mandate a form of disclosure that is uniform across all types of providers that are providing similar services. This form of disclosure should not, however, favor one form of investment vehicle over another, e.g. it should not be based on disclosures mandated by the SEC for mutual funds. Further, the assistance a uniform disclosure format would provide is a significant benefit to the plan fiduciary and would help achieve the goals of this new rule.

Bundled Service Arrangements

We understand the Department to propose to require that if a service provider offers a bundle of services, only that service provider need make the prescribed disclosures, including a listing of all services to be provided (regardless of who provides them), the aggregate direct compensation that will be paid for the bundle, and all indirect compensation that will be received from third parties by the service provider, its affiliates or subcontractors. Generally the bundled provider is not required to break down aggregate compensation or fees among the individual services comprising the bundle. Further, in general the bundled provider is not required to disclose the allocation of revenue sharing or other payments among affiliates or subcontractors within the bundle.

There are two exceptions to the general rule: one, if the persons in the bundle receive 'separate fees' charged against the plan's investment and reflected in the net value of the investment, then this separate compensation must be separately disclosed. Two, if compensation or fees are set on a transaction basis (even if paid from mutual fund management or similar fees) these must also be separately disclosed. These exceptions are useful but do not fully address the issue.

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[3] For example, investment options could include registered investment funds/mutual funds, bank collective trust funds, separately managed accounts, and insurance products. Due to the differences in the regulatory regime for these investment options, the plan sponsor may be presented with a variety of documents. We note also that the prospectus disclosure regimes designed for public offering of a security may not provide the compensation and/or conflict of interest information that plan fiduciaries should consider in making their determinations under the proposed rule. See, generally, "Private Pensions: Changes Needed to Provide 401(k) Plan Participants and the Department of Labor Better Information on Fees" (GAO-07-21) (Nov. 2006).

BGI believes that this approach to bundled service provider disclosure significantly undercuts the purpose of the proposed rule-- to increase plan fiduciary understanding of compensation and fees for services, so as to increase efficiency and competition in the service provider market.[4]

In the DB marketplace, excepting perhaps the 'small plan' market, the business model for service provision is 'unbundled'—investment management services are offered and priced separately from administration and often custody. This transparency has contributed to the salutary effect of bringing both investment management fees and administration costs down over the last decade. In the DC marketplace, as a result to some extent on how this segment developed historically, bundled service arrangements are more common.

An efficacious disclosure regime permits a comparison of like with like. Without imposing limits on what services may be bundled (solely from a disclosure perspective), the plan fiduciary will not be able to fully understand the alternatives presented.[5] It is important to note that a significant portion of DC plan expenses are for plan level administration and recordkeeping, and understanding that cost is key for plan fiduciaries to make appropriate fiduciary choices amongst service providers and investment options. And some industry participants may choose to bundle so as to obscure the true costs of a particular service.

The challenges faced by plan fiduciaries in making decision among service providers for the same services is compounded by the inability to easily make comparisons. For example, a plan fiduciary who is evaluating a proposal from (a) a bundled provider who offers a full range of affiliated investment options, (b) a proposal from an independent recordkeeper whose platform can accommodate most any investment option available in the DC market, and (c) a proposal from a bundled provider who permits the plan fiduciary to add unaffiliated investment options but is generally priced for plans using affiliated investment options will find it difficult to make an effective comparison of relative costs. In the first proposal, the plan fiduciary cannot determine the fee for plan level administration/recordkeeping, in the second the cost of administration and investment are separate and thus transparent, and in the third, the mix of investment options drives the overall cost to the plan and its participants, but without knowledge of the underlying fees in administration/recordkeeping, the plan administrator may be unable to determine if any particular affiliated investment option is appropriately priced.

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[4] There may also be an inadvertent consequence to this approach—to ease its burden of document collection and review, the plan fiduciary may seek out only fully bundled service arrangements, which would result in less competition among recordkeepers (independent recordkeepers would not be considered) and most likely less investment choice for plan participants. We encourage the Department to consider whether its proposed approach tilts the scale against both independent administrator-record keepers and those that offer "open architecture".

[5] Bundled services may provide the lowest cost alternative, especially for small plans. It's not the bundling of services together that is of concern, but the plan fiduciary's need to be able to compare the costs of certain services as between potential service providers and in myriad configurations (i.e., a record keeper may price its administrative services differently when its affiliated investment options are the only options offered as compared to when there is a mix of affiliated and unaffiliated options or even differences depending upon the mix of affiliated and unaffiliated.)

There is, of course, a balance to be sought between overly detailed disclosures that have little effect on decision making and fully aggregated bundled services that do not break out plan level administration and recordkeeping from the fees for investment options. As administration and recordkeeping and investment management are the two largest expense categories for DC plans, BGI believes that, at a minimum, service providers must separately disclose the fees to be paid for plan level administration and recordkeeping from those fees (or compensation received) for investment services.[6]

Effective Date

While BGI strongly believes that adoption of this proposed rule will bring increased efficiency and competition to the DC market, and that lower fees and expenses should result, and further that this would benefit participants more the sooner it occurs, there are practical limitations to implementation of the rule once final. Numerous contracts and arrangements will need to be reviewed and amended, and the industry must address the allocation of responsibility for the production of the information.[7] Thus we encourage the Department to consider an effective date that is at least one year after the proposed rule is promulgated as final.

Conclusion

BGI appreciates the efforts of the Department to assure that plan fiduciaries receive the information they need to make sound fiduciary decisions. We thank you for considering our comments on the proposed rule, and would welcome the opportunity to further discuss our views with you.

Sincerely,

Kristi Mitchem
Head, US Defined Contribution Business

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[6] Certain services are integral and in the ordinary course of business to the provision of administrative and recordkeeping services (e.g. participant communications) and similarly certain services are integral and in the ordinary course of business for investment management (e.g., custody and fund accounting) and would not need to be separately stated in order for the plan fiduciary to evaluate the contract or arrangement. If the provision of a service that is "integral" may present a conflict for the service provider, under the proposed rule a statement to this effect would be required.

[7] We understand that allocation discussions are underway in connection with implementation of the revised Form 5500.