

MEMO# 21396

July 27, 2007

Rep. Miller Introduces 401(k) Disclosure Bill

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TO: PENSION MEMBERS No. 44-07

FEDERAL LEGISLATION MEMBERS No. 4-07

BANK, TRUST AND RECORDKEEPER ADVISORY COMMITTEE No. 25-07

BROKER/DEALER ADVISORY COMMITTEE No. 43-07

OPERATIONS COMMITTEE No. 19-07 RE: REP. MILLER INTRODUCES 401(k) DISCLOSURE BILL

Representative George Miller (D-Ca) introduced the “401(k) Fair Disclosure for Retirement Security Act of 2007” (H.R. 3185), which would create additional sponsor- and participant-level disclosure requirements under ERISA and require a plan to include at least one index fund among its investment options. A copy of the bill’s text is attached.

Disclosure to Plan Administrators

The bill would prohibit a plan administrator of a 401(k) plan [\[1\]](#) from contracting with a service provider unless the plan administrator received in advance a written statement identifying who will provide services to the plan and an itemized schedule of the fees to be charged, including any amounts to be paid to affiliates or other third party service providers. [\[2\]](#)

The statement must disclose any conflicts of interest of each service provider due to a personal or financial relationship, including regarding proprietary fund offerings and payments for including investment options on a menu. The statement must disclose that share prices of mutual fund investments may be different than retail share price outside of the plan due to the existence of different share classes.

The statement must disclose the extent and amount of any payments received by a service provider, directly or indirectly, by means of charges against participant accounts that allow the provider to offer its services without charge or at a discount.

An updated statement must be provided to the plan administrator at least annually and within 30 days of any material change in the information. [\[3\]](#) The statement must be made available to participants and posted on any website maintained by the plan sponsor.

Disclosure to Participants

The bill would require the plan administrator of a participant-directed individual account plan to provide participants certain information upon commencement of participation, annually, and prior to the effective date of any change in investment options. The notice must set forth, for each investment option:

- investment objectives,
- level of risk,
- whether the option is a comprehensive investment designed to achieve long-term retirement security or should be combined with other options in order to achieve such security,
- the historical return and percentage fee assessed against amounts invested under the option,
- an explanation of the differences between any asset-based fees and any annual fees in connection with the option,
- a comparison to a nationally recognized market-based index or other investment option that is recommended in the retirement industry as a benchmark retirement investment option, and
- where additional, plan-specific, and generally available investment information regarding the option may be obtained.

The notice must include a statement that investment options should not be selected solely on the basis of fees but also on other key factors.

Participants must also receive a “fee menu” which must describe the service fees that could be assessed against their account, in three categories: fees that vary depending on the investment option chosen, fees that are assessed as a percentage of total assets in the account, and administration and transaction-based fees. The fee menu must include a description of the purposes of each fee.

Participants must receive an annual benefit statement [\[4\]](#) that includes information on their account balance, vesting, contributions, earnings, fees assessed during the year, the participant’s asset allocation by investment option, and net return for the plan year expressed both in dollars and as a return percentage, and as compared to a market-based index. The fees shown must indicate separately the types of fees, [\[5\]](#) and must show total fees expressed as a percentage of current assets.

Estimates and Model Statements

The bill at various points allows reasonable estimates to be used when the actual amount is not known. In addition, the bill requires DOL to issue models for all of these notices.

Penalties and Enforcement

DOL could assess a penalty of up to \$100 per day on plan administrators who fail to provide the required participant notices. [\[6\]](#) It would also require DOL to notify the SEC, the Comptroller of the Currency, or other regulator if DOL determines a service provider is engaged in a pattern or practice that precludes plans from complying, and to widely disseminate the service provider's identity.

The bill states that none of the new disclosure requirements shall be construed to limit (and no inference should be drawn regarding) a fiduciary's duty to ensure a plan pays only reasonable administrative expenses. [\[7\]](#)

Index Fund Requirement

The bill requires each participant-directed individual account plan to offer at least one "nationally-recognized market-based index fund" which offers, as determined from time to time by DOL, a "combination of historical returns, risk, and fees likely to meet retirement income needs at adequate levels of contribution."

New Advisory Council

The bill would create an Advisory Council on Improving Employer-Employee Retirement Practices, with representatives of plan participants and employers appointed by the President and the House and Senate labor committees.

Michael L. Hadley
Assistant Counsel

[Attachment](#)

endnotes

[\[1\]](#) The plan administrator provision applies only to defined contribution plans that have a qualified cash or deferred arrangement under Internal Revenue Code Section 401(k)(2) and would not apply to other defined contribution plans or defined benefit plans. The disclosure requirements for participants would apply to all participant-directed individual account plans.

[\[2\]](#) The itemized statement must include information on commissions for making a sale, start-up fees, expenses for investment management, expenses for investment advice, estimated trading expenses, expenses for administration and record keeping, legal fees, trustee fees, possible termination or surrender charges, total asset based fees, 12b-1 fees, soft dollar commissions, and any other costs specified by DOL.

[\[3\]](#) The bill would require that the obligation to provide the updated statement be a term of the service contract.

[\[4\]](#) This annual statement would be in addition to the new quarterly benefit statement required by the Pension Protection Act.

[5] The bill would require a separate listing of underlying investment fees (including expense ratios and “trading costs”), load fees, total asset based fees (including variable annuity charges), mortality and expense charges, guaranteed investment contract fees, employer stock fees, directed brokerage charges, plan administration fees, participant transaction fees, total fees, and total fees as a percentage of current assets.

[6] The bill would add the civil penalty to ERISA section 502(c)(7). This section states that each violation with respect to any single participant or beneficiary is treated as a separate violation.

[7] The bill references only ERISA section 404(a)(1)(A)(ii). More generally, section 404(a)(1)(A) requires a fiduciary to discharge his duties solely in the interests of participants and for the exclusive purpose of providing benefits to participants and defraying the reasonable expenses of administering the plan.

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