

PUBLIC SUBMISSION

Received: August 17, 2023 Tracking No. llf-76v5-tdl8 Comments Due: October 10, 2023 Submission Type: API

Docket: EBSA-2023-0011

Request for Information—SECURE 2.0 Reporting and Disclosure

Comment On: EBSA-2023-0011-0001

Request for Information: SECURE 2.0 Reporting and Disclosure

Document: EBSA-2023-0011-DRAFT-0006

1210-AC23 comment 00007 Tobe 08172023

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General Comment

Defined Contribution Plan Fee Disclosure Improvements: Section 340

By Chris Tobe, CFA, CAIA August 17, 2023

Fee disclosures currently are horrible - most plans, much less participants do not have a clue what their fees are. There are simple steps to improve this situation quickly and dramatically. The 1st step - strip away prohibited transaction exemptions from non-transparent contracts like annuities, do not grant new ones to Private Equity and Crypto. Also, ban revenue sharing. (see attached full comments)

Attachments

DOLAug23commentsFeeDisclosureImprovements



Defined Contribution Plan Fee Disclosure Improvements: Section 340

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Fee disclosures currently are horrible - most plans, much less participants do not have a clue what their fees are. There are simple steps to improve this situation quickly and dramatically. The 1st strip away prohibited transaction exemptions

1. Do not allow non-transparent investment structures.

ERISA has stated that two general types of transactions are prohibited: transactions with “parties in interest” and “fiduciary self-dealing transactions.”ⁱ I think all contracts (non-security based investments) are prohibited transactions by structure - which includes 1. Cryptoⁱⁱ 2. Private Equityⁱⁱⁱ and 3. Annuities^{iv}

The insurance industry in pursuit of conflicted compensation has lobbied the Department of Labor for Exemptions successfully for Prohibitive Transactions Exemption (PTE) 84-24 and updated it with PTE 2020-02. The Private Equity industry continues to lobby for an exemption as well.^v The Crypto industry was lobbying hard until the recent set of scandals. I see these Prohibitive Transactions Exemptions as corrupt “get out of jail free cards” and I believe most participants if they were aware of these PTE’s would see them as corruption as

well. The best way to immediately get more fee transparency would be to lift these exemptions and follow the spirit of the law and not allow these high fee high risk non-transparent type assets.

2. Do not allow Revenue Sharing – getting rid of it would be a vast improvement in transparency in administrative fees^{vi}

401(k) Revenue sharing is a scheme that is sold to 401(k) plans sponsors who are too cheap to pay the administrative costs out of company funds, and thus are willing to trick participants into paying for it by an increase in fees in high-cost mutual funds and even higher cost annuities.^{vii} While in theory the excessive fees are kicked back for administrative fees, but do to the lack of transparency there is no way to track if they are covering 10% or 90% with the recordkeeper keeping the rest in excessive fees. Also, administrative fees could be artificially inflated so revenue sharing is a complete scam for excessive fees.

A 2021 study by experts from the Federal Reserve and leading Universities. *“The future performance of revenue-sharing funds is weaker than that of non-sharing funds. The bulk of the under-performance is driven by higher fees, though revenue sharing funds display lower performance even after accounting for fees.”*^{viii}

3. Do not allow Conflicted Consultants and better Governance^{ix}

Plans turn to investment consultants and advisors to give them fiduciary advice. However, many have conflicts of interests and have been fined by the SEC and other regulators for it and need to be held to standards.^x Require Retirement Plans to have Investment Policy Statements (IPS)^{xi}
DOL should put rules in for plan consultants including running background checks.^{xii}

4. Improve disclosure of SEC Registered Mutual Funds

Investment Fee disclosures of SEC Mutual Funds are fairly good in 404a-(5) participant disclosures compared to non funds. However, their transparency is many times not good on quarterly statements and 5500's, which seem to hide share class, ticker and full fee transparency. Many times 404a-5 s are sent separately once a year and participants have no clue what they are and throw them away.

5. If you can not ban non-transparent investment structures provide more transparency

Since target dates are 50% of all 401(k) assets, the individual components ie Equity, fixed allocation, demand the same level of transparency as individual stand alone options.^{xiii} Transparency issues in Target Date funds are caused by burying – prohibited (but exempted) structures in poorly state regulated CIT's. Investment Fee disclosures of Collective Investments Trusts are usually poor in 404a-(5) participant disclosures. These CIT's^{xiv} hide Conflicted investments which by structure are prohibited transactions with non transparent fees like 1. Crypto^{xv} 2. Private Equity^{xvi} and 3. Annuities^{xvii}

Investment Fee disclosures of General Account Insurance products are usually poor in 404a-(5) participant disclosures. Most of the profit over 200 basis points is in hidden spread.

Investment Fee disclosures of Separate Account Insurance products are usually poor in 404a-(5) participant disclosures. Most of the profit over 150 basis points is in hidden spread.

6. If you cannot ban Revenue Sharing provide more transparency in recordkeeping

Incorporate all the 408(b)(2) disclosures from vendors to plans in the participant 404a-(5) disclosures including those on prohibited transactions

Disclose all shelf or platform fees between managers and recordkeepers.^{xviii}

Disclose all "indirect compensation" outlined in the 5500 and include all commissions including insurance commissions.

ERISA is designed by prohibited transactions to limit investments to those transparent like SEC registered mutual funds. The DOL itself by bowing to industry pressure and allowing Prohibited Transaction exemptions and practices like revenue sharing is the main impediment to better fee disclosure.

Chris Tobe, CFA, CAIA is a national expert on excessive fees in retirement plans. He has written 4 books and dozens of articles on transparency, excessive fees & corruption in investments. His own firm Tobe Consulting has advised on over 70 ERISA legal cases on behalf of investors who have lost money through risky and/or high fee investments. He serves as Chief Investment Officer for a minority woman owned pension consulting firm out of New Orleans the Hackett Robertson Tobe group

ⁱ <https://www.boutwellfay.com/faq-prohibited-transaction-erisa#:~:text=1%20Two%20general%20types%20of,a%20class%20or%20individual%20basis.>

ⁱⁱ <https://commonsense401kproject.com/2022/06/18/brokerage-windows-exposed-by-crypto/>

ⁱⁱⁱ <https://commonsense401kproject.com/2022/02/15/private-equity-in-401k-plans-a-ticking-time-bomb/>

^{iv} <https://commonsense401kproject.com/2022/05/11/annuities-are-a-fiduciary-breach/>

^v https://pensionwarriorsdwardsiedle.substack.com/p/16-reasons-pensions-401ks-should?r=edkp&utm_campaign=post&utm_medium=web

^{vi} <https://commonsense401kproject.com/2022/10/03/record-keeping-costs-and-the-war-against-transparency/>

^{vii} <https://commonsense401kproject.com/2022/04/02/revenue-sharing-in-401k-plans/>

^{viii} Pool, Sialm, and Stefanescu, Mutual Fund Revenue Sharing in 401(k) Plans, May 14, 2021, available at: <https://ssrn.com/abstract=3752296>

^{ix} <https://commonsense401kproject.com/2022/03/09/conflicted-401k-consultants-should-plan-sponsors-fire-them-sue-them-or-both/>

^x <https://commonsense401kproject.com/2023/02/01/401k-plan-sponsors-should-look-to-cfa-code-for-investment-governance/>

^{xi} <https://commonsense401kproject.com/2023/03/12/investment-policy-statements-crucial-to-fiduciary-duty/>

^{xii} <https://commonsense401kproject.com/2022/07/24/401k-background-checks/>

^{xiii} <https://commonsense401kproject.com/2022/06/07/toxic-target-date-case-study-of-the-worst-of-the-worst/>

^{xiv} <https://commonsense401kproject.com/2022/02/22/cits-collective-investment-trusts-in-401k-the-good-and-the-bad/>

^{xv} <https://commonsense401kproject.com/2022/06/18/brokerage-windows-exposed-by-crypto/>

^{xvi} <https://commonsense401kproject.com/2022/02/15/private-equity-in-401k-plans-a-ticking-time-bomb/>

^{xvii} <https://commonsense401kproject.com/2022/05/11/annuities-are-a-fiduciary-breach/> ^{xvii}
<https://commonsense401kproject.com/2022/02/28/stable-value-the-good-the-bad-and-the-ugly-avoiding-litigation/> ^{xvii} <https://commonsense401kproject.com/2022/02/10/401k-lifetime-income-a-fiduciary-minefield/>

^{xviii} <https://www.groom.com/resources/fidelitys-mutual-fund-shelf-space-payments-targeted-by-plaintiffs/>