



September 8, 2008

Ms. Susan M. Halliday  
Ms. Kristen L. Zarenko  
Office of Regulations and Interpretations  
Employee Benefits Security Administration  
Room N-5655  
U.S. Department of Labor  
200 Constitution Avenue, NW  
Washington, DC 20210

Re: Participant Fee Disclosure Project—Comments regarding “Fiduciary Requirements for Disclosure in Participant-Directed Individual Account Plans,” 73 Fed. Reg. 43013 (July 23, 2008).

Dear Ms. Halliday and Ms. Zarenko:

NewRiver, Inc. appreciates the opportunity to provide its views on the U.S. Department of Labor’s (“Department”) Proposed Regulation on “Fiduciary Requirements for Disclosure in Participant-Directed Individual Account Plans,” 73 Fed. Reg. 43013 (July 23, 2008) (“Proposal”).

NewRiver applauds the Department’s efforts and supports the Proposal. We believe the Proposal represents an important step in ensuring that every American who invests in mutual funds and other investment vehicles through participant-directed retirement plans (“Plans”) receives important information regarding his or her Plan and its designated investment alternatives (“DIA”).

1. Introduction

A. About NewRiver

Since 1995, NewRiver has provided electronic delivery products and services to entities in the financial industry, including issuers, distributors, underwriters, broker-dealers, sponsors and administrators (“Financial Intermediaries”) of registered open-end management investment companies, exchange traded funds, variable annuities, and variable life products (“Funds”). NewRiver maintains an electronic database that provides Financial Intermediaries access to a comprehensive online library of Fund-related disclosure documents (“Disclosure Documents”), including prospectuses, statements of additional information, shareholder reports, and supplements to the above. NewRiver helps Financial Intermediaries, including Financial Intermediaries that provide services to Plans, to comply

with disclosure obligations under various laws by providing Disclosure Documents to investors in print, using digital print-on-demand, or electronically.

**B. NewRiver's Expertise**

NewRiver was founded on the premise that Financial Intermediaries, though wanting to comply with their disclosure obligations, were not best-positioned to develop efficient delivery vehicles for Disclosure Documents. That was so because many Financial Intermediaries' businesses primarily focused on providing services and superior investment returns for their clients. NewRiver saw an opportunity to help Financial Intermediaries more effectively comply with their disclosure and delivery obligations. To this end, NewRiver pioneered the first electronic prospectus and delivery services designed to meet the electronic delivery requirements set forth in the Securities and Exchange Commission's ("SEC") e-delivery releases, as well as "investor specific" digital print-on-demand and data mining technologies. Print-on-demand technology enables custom delivery of Disclosure Documents that relate solely to each investor's securities holdings and are based on the investor's transaction history. Data mining technology allows delivery of Fund information in the form of interactive data based on the currently effective Disclosure Documents, and allows auditability and enhanced disclosure by enabling linking from the data to its location in the source document. NewRiver's expertise in this regard is increasingly relevant to Plans and their participants and beneficiaries ("Participants"). NewRiver currently provides services that affect an estimated 20 million Participants.

**2. Summary of the Proposal and NewRiver's Views**

A short summary of the Proposal may be helpful to understand NewRiver's comments and concerns. The Proposal includes proposed regulation 29 C.F.R. § 2550.404a-5 ("Proposed Regulation" or "Proposed Reg."). The Proposed Regulation states that section 404(a)(1)(A) and (B) of ERISA requires one or more fiduciaries of Plans to ensure that Participants "are made aware of their rights and responsibilities with respect to investment of assets held in, or contributed to, their accounts and are provided sufficient information regarding the plan, including fees and expenses, and regarding DIAs, including fees and expenses attendant thereto, to make informed decisions with regard to the management of their individual accounts." Proposed Regulation at (a). The Proposed Regulation requires fiduciaries to provide the information described in paragraphs (c) and (d) at the times stated therein. The information required by those paragraphs falls broadly into the following categories:

<b>Type of Information</b>	<b>When Provided</b>
(1) General information about the Plan. Proposed	On or before Participant eligibility ("Eligibility") and at least annually

Reg. at (c)(1).	thereafter with information about material changes 30 days after adoption
(2) General information about Plan-wide and Participant-specific expenses. Proposed Reg. at (c)(2)(i) and (c)(3)(i).	Eligibility
(3) Individualized information about Plan-wide and Participant-specific expenses actually charged to a Participant's account. Proposed Reg. at (c)(2)(ii) and (c)(3)(ii).	Quarterly
(4) Summary information about each DIA. Proposed Reg. at (d)(1) and (2).	Eligibility
(5) Information relating to voting and other appurtenant rights. Proposed Reg. at (c)(3).	After Participant investment
(6) Detailed information about each DIA. Proposed Reg. at (d)(4).	On Participant request <u>or</u> Eligibility

Additionally, the Proposal would amend the Department's current information delivery requirements as set forth at 29 C.F.R. § 2550-404c-1(b)(2)(B) ("404c Regulation") to replace them with the information required by paragraphs c and d of the Proposed Regulation.

NewRiver applauds the Department's determination to ensure that Participants receive adequate information so that they can effectively manage their accounts. Much of the Proposal, particularly the information relating to Plan provisions, Plan fees and expenses, and voting rights (summarized at items 1, 2, 3, and 5, above) will help achieve this goal. NewRiver has no concerns regarding these aspects of the Proposal. Additionally, NewRiver believes that summary information about DIAs and the Department's proposed chart (collectively, the "DIA Chart") (item 4, above) will be helpful to Participants. However, NewRiver believes that Participants should automatically receive more detailed information about DIAs (item 6, above) presented in consistent and comparable formats.

### 3. Comments regarding the Proposal

NewRiver agrees with the Department that Participants should receive sufficient information to make informed decisions about the management of their Plan accounts.

NewRiver believes that the Proposal can and should be strengthened to promote this goal in the following ways:

- Participants should receive summary prospectuses in addition to the DIA Chart;
- Participants should receive comparable information about DIAs that are not mutual funds;
- Participants should receive meaningful, comparable benchmark and performance information; and
- Electronic delivery should be encouraged while permitting Participants to opt out of electronic delivery.

A more detailed discussion of these concerns follows.

- A. Participants should receive Summary Prospectuses in addition to the DIA Chart
  - i. Summary Prospectuses provide necessary information about DIAs, particularly for Participants who receive information in paper format

NewRiver strongly believes that Participants should automatically receive more information about DIAs in their Plan than the information that is required to be presented on the DIA Chart. We note that the SEC is currently finalizing a proposed regulation that will require summary prospectuses to be delivered to investors in registered investment companies (“SEC Proposal”).<sup>1</sup> The SEC Proposal reflects the exhaustive and thoughtful efforts of the SEC, Financial Intermediaries, and others to provide necessary information in a format that is useful to investors. NewRiver believes that the SEC’s work regarding the summary prospectus should inform the Department’s efforts to provide meaningful information about DIAs to Participants. NewRiver also believes that, when the SEC Proposal is finalized, summary prospectuses will prove to be an effective and cost-efficient way to communicate important information about mutual funds to investors.

Although the SEC Proposal is not yet final, the summary prospectus is expected to be brief (not more than five pages for a single mutual fund) and easily understood. The summary prospectus will provide information about a mutual fund’s performance, fees, investment objectives, risks, management style and personnel. Moreover, this information is organized in a standardized format for easy comparison. Finally, the summary prospectus

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<sup>1</sup> See SEC Release No. 33-8861 (Nov. 21, 2007).

clearly states how an investor can easily access or request (via the internet, mail, or phone) additional information, regardless of whether the summary prospectus is provided in paper or electronically.

The Department has expressed concern that full mutual fund prospectuses are not helpful to Participants. *See, e.g.*, Proposal at note 12 and accompanying text. NewRiver believes that the SEC Proposal addresses such concerns. While the DIA Chart is certainly brief and may be a useful first step for many Participants, it should not be the only information about the DIA that Participants receive automatically. Among other things, the DIA Chart is too focused on performance, provides only limited information regarding fees and it does not provide information about a DIA's investment objectives, risks or management. Most importantly, however, the DIA Chart does not notify Participants as to how to access easily or request additional information about a DIA.

Although the DIA Chart will list a website for each DIA, NewRiver does not believe that this gives Participants sufficient help in finding or obtaining important information. This is particularly true for the majority of Participants who will receive information about DIAs in paper format.<sup>2</sup> Unlike the summary prospectus, the DIA Chart does not tell Participants how to obtain paper copies of the additional information that is otherwise available at the referenced web pages. This omission may make it difficult for Participants, particularly those who receive disclosures on paper, to obtain such information. Moreover, if Participants (whether receiving the DIA Chart in paper or electronically) actually obtain such additional information, there is no requirement that it be in any standardized format, making it significantly harder to utilize such information for comparative purposes. While Participants should be encouraged to do additional research about DIAs, the Proposal effectively requires Participants, particularly Participants who receive the DIA Chart in paper format, to do more research merely to obtain basic information about a DIA.

Thus, if the Department does not require delivery of a summary prospectus, Participants who receive paper delivery of the DIA Chart will find it significantly harder to obtain additional information than those who receive it electronically. NewRiver does not believe it is appropriate to adopt a rule that disfavors Participants that do not have access to the internet and effectively denies them meaningful information that is given to other Participants.

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<sup>2</sup> The Department stated that it assumes that only 38 percent of disclosures required under the Proposed Regulation will be sent electronically. Proposal at 43024.

- ii. Participants should receive Summary Prospectuses on investment in a DIA

NewRiver believes that Participants should receive a summary prospectus when they invest in a DIA or shortly thereafter. The Department's current 404c Regulation requires a profile prospectus or similar information to be provided to Participants immediately before or immediately after investment in a mutual fund.<sup>3</sup> Similarly, the federal securities laws and SEC regulations require that mutual fund investors receive a prospectus immediately after investment in a mutual fund or not later than the investor's receipt of confirmation of the investment. As noted above, however, if the Proposal is adopted as proposed, Participants will receive a summary prospectus only on request. Allowing Participants to request a summary prospectus is not sufficient in light of industry experience. NewRiver and other industry experts know that investors rarely request information to which they are entitled but that is not automatically provided. The Proposal should be revised to be consistent with the Department's current position with respect to 404(c) plans and the position set forth in the SEC Proposal.

- B. Participants should receive comparable information about DIAs that are not mutual funds

The Proposal invites comments regarding disclosures about DIAs that are not mutual funds or otherwise subject to federal securities laws. Proposal at 43015. NewRiver recognizes that mutual funds are not the only type of DIA that Plans may offer. Plans can, and increasingly do, offer a wide variety of pooled funds as DIAs, including bank or trust collective funds, insurance company separate accounts and other insurance products, and unregistered investment funds. The Department should not limit a Plan's ability to select a DIA that is not a mutual fund.

However, the Department should recognize that mutual funds that are not DIAs may be subject to a wide variety of different federal or state laws and regulations. For example, bank-sponsored collective funds may be subject to federal regulation, state regulation, or both. Insurance companies are subject exclusively to state regulation. The differing federal and state laws that may apply to these entities may or may not require disclosure of information to investors that the Department believes Participants should receive. For example, federal banking law does not require any specific form of disclosure to investors in bank-sponsored collective trusts and banks.

While the Department cannot and should not attempt to regulate the vast array of investment funds that may be selected as DIAs, the Department should insist on consistent

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<sup>3</sup> See Advisory Opinion 2003-11A (Sept. 8, 2003).

disclosure standards for all DIAs. Put another way, the Department should ensure that Participants receive the same information, and in the same format, about every DIA offered by a Plan. As drafted, the Proposal does not accomplish this goal. For example, assume a Plan that offers six DIAs, two of which are mutual funds, two of which are bank-sponsored collective funds, and two of which are insurance products. A Participant who asks for a summary prospectus “or similar documents” pursuant to the Proposed Regulation at (d)(4) may receive information in as many as five different formats. These differences will not make it easy for the Participant to compare the six DIAs. For this reason, the Department should require that, with respect to DIAs that are not required under federal securities laws to have a summary prospectus, the same information is made available to Participants or Plan sponsors as the information available in a summary prospectus and in the same format. This non-mutual fund summary will ensure that Participants receive comparable information about all of a Plan’s DIAs.<sup>4</sup>

Additionally, the Department should maintain a database of non-mutual fund summaries. Investors can access mutual fund prospectuses on the SEC’s website. Among other things, this public database permits plan sponsors to compare information about mutual funds and allows third-parties, including, for example, NewRiver and Morningstar, to compile comparative data about mutual funds that may be helpful to plan sponsors and Participants. The database need not be detailed, but should be searchable. The Department currently maintains searchable databases or collections of filed information about, for example, abandoned plans, Form LM-10 filings, Department exemptions, advisory opinions and other guidance. While filing summaries and maintaining a database may impose some burdens on providers and the Department, it is necessary to ensure that plan sponsors and Participants have sufficient and comparable information about DIAs that are not mutual funds. Public access to this information may also promote the Department’s stated goal of reducing fees paid by Plans and Participants.

- C. Participants should receive meaningful, comparable benchmark and performance information
  - i. Comparable benchmark information is important to Participants

The Department invited comments regarding the application of benchmarks, particularly with respect to DIAs that are not mutual funds. Proposal at 43017. For the reasons described above, NewRiver believes that, to the greatest extent possible, Participants should receive consistent information about benchmarks used by a DIA regardless of whether

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<sup>4</sup> These comments concern diversified collective investment vehicles that are offered as DIAs. NewRiver has no views as to whether employer stock funds offered as DIAs should be required to submit summary prospectus information.

a DIA is required to refer to a benchmark pursuant to the federal securities laws. Failure to provide this information to Participants will hinder their ability to make meaningful comparisons regarding performance of the various DIAs offered under his or her Plan.

Moreover, the Department should be aware that investment funds in the same asset class may use different benchmarks. For example, mutual funds that invest in stock of large, highly capitalized, U.S. companies may use the S&P 500, the Russell 1000 or any other well-known index as a benchmark for performance reporting purposes. The Department should therefore consider requiring all DIAs to report more than one benchmark to promote Participant comparison of performance.

- ii. The Department should clarify when information about DIAs must be updated

The Department should clarify when certain information regarding DIAs needs to be updated. Updated information concerning benchmarks, performance, fees, and expense ratios should only be required to be disclosed annually. DIA performance changes daily, as does performance against any benchmark. Expense ratios also change daily in relation to performance. As the Proposed Regulation is drafted, particularly paragraph (d)(1)(v), it is not clear whether benchmark, performance and expense ratio information must be updated more frequently than annually. We believe that information that is updated by “sticker” on a summary prospectus, such as a change in managers, should be required to be provided to Participants on the same terms that it is provided to ordinary investors in a mutual fund; namely as of the Participant’s next investment in the DIA. The Department should clearly state that benchmark, performance, fees, and expense ratios need only be updated as of the annual update of the DIA Chart or prospectus and that material information that would cause a summary prospectus to be supplemented by “sticker” need only be provided on a Participant’s next subsequent investment in the DIA in order to comply with the Proposed Regulation and with ERISA sections 404(a)(1)(A) and (B).

Additionally, the Department should require that such information be consistent with or obtained from the most recent prospectus and should relate to the calendar year for which such prospectus contains financials. Presenting such information in a DIA Chart (or other format) for different time periods would not facilitate comparison. Moreover, allowing the information to come from sources other than the prospectus would make it difficult for service providers to obtain the information for purposes of generating the DIA Chart.

- D. Electronic delivery should be encouraged while permitting Participants to opt out of electronic delivery

The Department has properly encouraged electronic delivery of the information required by the Proposal. However, regulatory and other barriers exist that make it less



likely that affected persons will be able to successfully deliver the required information electronically. For example, NewRiver has observed that, where an investor's affirmative consent is required for electronic delivery, few investors—approximately ten percent—provide the required consent. If the Department hopes to achieve the electronic delivery rates assumed by the Proposal, alternate consent collection approaches will be necessary. As Congress and the Department recognized in the context of recent amendments to ERISA and the Internal Revenue Code permitting automatic enrollment in Plans and related Department regulations, employees may be disinclined to take affirmative steps to participate in a Plan and make affirmative investment decisions, even though these actions are in their interest. The problem is similar here, where electronic delivery to Participants with internet access provides significant advantages to Participants (such as easier access to information) and Plans (such as reduced costs) but those advantages are lost because too many of those Participants fail to provide the required consent.

Accordingly, the Department should modify the Proposed Regulation to permit electronic delivery to all Participants unless a Participant opts out of such delivery (in which case the Participant will receive information in paper format). Specifically, the Department should permit automatic electronic delivery of information required under the Proposal to every Participant with a plan-sponsor e-mail address (who can reasonably be presumed to have regular internet access at work) or other valid e-mail address (who can reasonably be presumed to have regular internet access at another location) unless the Participant opts out of electronic delivery. To protect Participants who do not have internet access, the Department could adopt a presumption that if there is no valid e-mail address for a Participant, the Participant has opted out of electronic delivery. However, all Participants for whom the plan administrator has a valid e-mail address would receive an e-mail notice informing them that they will default to electronic delivery of information under the Proposal if they do not opt out within a reasonable time period. The e-mail notice would specify the relevant timeframe for opting out and provide specific instructions about how to opt out. To avoid revisions of other Department regulations, this approach could be limited to the information required under the Proposed Regulation. Such an approach would promote electronic delivery and make it more cost-effective to provide the information required by the

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Proposal while protecting Participants who do not have internet access.

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If you have any questions regarding these comments, please feel free to contact me at 978-247-7267.

Sincerely,

/s/ Russell Planitzer

Russell Planitzer  
Chairman and Chief Executive Officer  
NewRiver, Inc.

cc: Leonard Driscoll  
Jeffrey Levering  
Alex Magary  
NewRiver, Inc.