

From: Chris Tobe
Sent: Friday, September 17, 2021 3:21 PM
To: EBSA.E-ORI; Vaught, Grant E – OPA; Nieves, Edwin - OPA
Subject: 5500 Comments RIN 1210-AB63 21-1560-NAT

5500 Comments 21-1560-NAT on Fee Disclosures

RIN 1210-AB63

September 17, 2021

Overview

5500 Fee Disclosures of Defined Contribution Retirement Plans so far have saved consumers \$billions in excess fees. However more complete and transparent disclosures could save even more in \$billions in fees and provide better risk disclosures for consumers. I have worked as an investment fee expert on over 70 of these ERISA 401(k) fee cases and have seen a wide variety of disclosures.

A recent GAO study showed that nearly 40% of participants did not even know they paid fees. This lack of fee knowledge disclosure all starts with the 5500 form which is filed incompletely and inconsistently by thousands of plans.

The first step is for consistency and the 5500 should have all the 404a-5 fee disclosures with the ability to reconcile them. SEC registered mutual funds should be clearly distinguished by ticker symbol between Variable annuities and fixed and index annuities and collective investment trusts.

These are all principles gone over in detail in *Retirement Plan Transparency ? Opaque Data Hinders Best-Interest Advice* Morningstar June 2018 by Aron Szapiro & Lia Mitchell a piece that I encourage the DOL to use in this process who conclude that *“information on the administrative and investment fees participants pay on the 5500 is inaccurate and limited.”*^[1]

Insurance based Products

After spending nearly 7 years as an officer of a major insurance company providing DC products, I have a unique vantage point. Most DC profits for insurance companies come in spread many times 200 to 300 basis points in annual costs which is not disclosed in any meaningful way and should be.

I have a number of suggestions for better transparency. All insurance products are regulated by a specific state regulator. Most major insurance providers own

multiple companies in multiple states and can cherry pick states with the weakest regulations and lowest capital requirements. All insurance products associated with a plan need to list the Specific name of the company whether it is in the general or a specifically numbered separate accounts and the state of issuance. This disclosure should also include variable annuities, even though they have superficial SEC regulation.

Most all insurance products have a broker of record who receives a commission, this specific individual should be disclosed. All insurance contracts should require ERISA fiduciary duty language.

Risk disclosures are needed for many insurance products. There are some good examples of annuity risk controls. In Vanguard, T.Rowe and Fidelity stable value options, the synthetic annuities wrapping assets are diversified by 3 to 4 providers and there are step up provisions for the other providers if there is any credit issues with a single provider.

However, many annuity products especially as plans get smaller have the single entity credit and liquidity risk of a specific insurance company. If the insurance company is downgraded the plan is prevented from doing its fiduciary duty in getting out of the investment and must ride the investment all the way to default. For any insurance product that does not provide liquidity in a “downgrade” there needs to be additional risk disclosure.

Additional Disclosures for Recordkeepers

Details of revenue sharing arrangements vary by form demand level of detail that should match and reconcile with 404a disclosures

More disclosures of profits from proprietary funds of the record keeper

Disclosure of platform/ shelf space fees paid by funds in the plan to the recordkeeper

Additional Disclosures for Consultants/Broker Advisors

Disclosure if consultant is affiliate/captive of recordkeeper or other vendors in the plan

Disclosure if Consultant has a Dual Broker relationship and more fee disclosure from investment managers. Dr. Boyson of Northeastern U. wrote a paper finding RIA's which both charge fees and commissions (dual registration) use higher fee lower performing mutual fund families that kick them back the most in “revenue sharing”^[iii]

Disclosure of any consultants who also have insurance licenses. Discloser of any undisclosed brokers receiving insurance commissions

Additional disclosures for CIT's

While the CIT's from major providers like Vanguard, Fidelity, etc. have led to lower fees, CIT's can be abused. The Morningstar article goes into excellent detail on these issues.^[iiii]

Not all CIT's are OCC regulated, some are regulated by weaker state banking commissioners and need to be disclosed.

All CIT's should require ERISA fiduciary duty language for the fund and any underlying investment products which can contain insurance or alternative investments trying to hide fees and risks.

Additional disclosures for Target Date Funds

Underlying investments in target date alternative and insurance based accounts should provide full disclosure for risk and fees. Target Date funds need full disclosures as they will be fund of funds CIT's inside of Separate Account Insurance pools. Insurance and alternative products buried inside of CIT's. All methods of hiding profits and fees. DOL should require ERISA fiduciary duty language for the fund and any underlying investment products in any underlying contract language.

Also look underneath all SEC registered securities mutual funds and require them to fully disclose all the non-SEC registered securities in them

Schedule C Service Provider Information

Part I Receiving only Eligible Indirect Compensation The Morningstar article points out

Further, plans are specifically exempted from reporting these types of indirect expenses on the Form 5500 as they are treated as eligible indirect compensation. This concept was introduced in the 2009 revisions of the Form 5500 and created significant confusion as the term does not exist in other regulation and has no clear parallel. Unfortunately, the misunderstanding of eligible indirect compensation persists, resulting in inconsistent and, therefore, unreliable reporting^[lv]

More disclosure of this indirect compensation is needed.

Not distinguishing between regular options and immaterial brokerage window investments on indirect compensation, either by section or by \$in the plan.

Schedule H Part 2

Administrative Expenses

Lack of consistency of reporting

Should match and reconcile with Schedule C

Financial Statement Supplemental Schedules

Schedule H Line 4i. Schedule of assets typically does not include fees or even the ticker so that you distinguish the share class, in a blatant effort to hide fees.

Thank you very much for your considerations for additional transparency in the 5500 forms.

Chris Tobe, CFA, CAIA has over 30 years of institutional investment experience and has working with multiple asset classes in public and private pensions. He currently has his own firm based out of Louisville that does expert work for ERISA cases christobe.com/litigation/ involving complex assets including stable value, christobe.com/stablevalue/ target date funds, index funds. He has spent over 7 years as an regulator/auditor and legal expert on ERISA and asset management issues. Tobe also serves as Chief Investment Officer of the Hackett Group a New Orleans based minority Woman owned business doing major projects with public pensions.

^[ii] Retirement Plan Transparency ? Opaque Data Hinders Best-Interest Advice Morningstar June 2018 Aron Szapiro & Lia Mitchell

^[iii] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3360537

^[iii] Retirement Plan Transparency ? Opaque Data Hinders Best-Interest Advice Morningstar June 2018 Aron Szapiro & Lia Mitchell

^[iv] Retirement Plan Transparency ? Opaque Data Hinders Best-Interest Advice Morningstar June 2018 Aron Szapiro & Lia Mitchell

--

Chris Tobe, CFA, CAIA

christobe.com