

## Congress Introduces Legislation on 401(k) Fees

401(k) fees have been widely criticized in the press and the courtrooms. In late July, Representative George Miller (Democrat, California) introduced the 401(k) Fair Disclosure for Retirement Security Act of 2007 (“Miller Bill”) which would require specific disclosures regarding the fees paid directly and indirectly from retirement plan assets. In addition to detailed fee disclosures, service providers would be required to advise plan sponsors of any potential conflicts of interest that the service providers have, including financial relationships with others and the use of proprietary funds. The plan sponsor would then be required to disclose these potential conflicts to plan participants. Furthermore, self-directed 401(k) plans would be required to offer a low-cost balanced index fund as an investment alternative.

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of our **Employee  
Benefits and Executive  
Compensation Group** has  
prepared this update for  
our clients and friends.  
You should consult  
with your legal advisors  
regarding your specific  
situation.

### Current Law

The Employee Retirement Income Security Act (“ERISA”) sets high standards for plan fiduciaries but is largely silent with respect to fee disclosures. However, plans seeking ERISA Section 404(c) protection (so that the primary responsibility for investing plan assets rests with the participants who self-direct their respective accounts) must disclose sufficient information about fees so that the participants can make informed investment decisions. ERISA’s cardinal rule with respect to fees is that all fees paid from plan assets be reasonable. Therefore, even under current law, plan fiduciaries should understand fully the fees paid by a tax-qualified retirement plan and assess the reasonableness of fees on a regular basis.

### Major Provisions of the Miller Bill

The Miller Bill requires that the fees paid from participant accounts in 401(k) plans be disclosed to them in great detail and at specific points in time. The starting point for fee disclosure is a new requirement that plan administrators receive complete fee information from recordkeepers, investment managers and other service providers. The Miller Bill provides for:

- **A Comprehensive Service Disclosure Statement** – A plan administrator of a 401(k) plan cannot enter into a contract for plan services unless the plan administrator receives a written disclosure from the service provider containing the following information:
  - A description of all services to be provided and the party who will provide them;
  - A listing of all conflicts of interest in the relationship; and
  - The total annual cost of services, including separate (unbundled) costs for investment management, investment advice, recordkeeping, trustee fees, revenue sharing (such as 12b-1 fees), trading expenses, commissions and surrender charges.

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The Service Disclosure Statement must be posted on any intranet site maintained by the plan sponsor, and must be provided to participants upon request.

- **Detailed Participant Disclosures** – Participants in 401(k) plans must receive:
  - A written explanation of the investment funds offered, the fees with respect to each fund and a detailed “Fee Menu” which compares the funds; and
  - An annual benefit statement with specific fee disclosures.
- **Inclusion of Balanced Index Fund in the Investment Line-up** – Self-directed 401(k) plans must provide a market-based balanced index fund as one of the investment options offered to participants. The fees for this fund must meet standards to be issued by the Secretary of Labor, and are intended to be lower-cost funds than actively managed funds.
- **Establishment of a Retirement Council** – An Advisory Council on Improving Employer-Employee Retirement Practices would be formed, which would issue an annual report on retirement trends and issues.

## Other Proposals on the Hill

Congressman Richard Neal (Democrat, Massachusetts) is considering a bill with more moderate requirements. His proposal would not require the complete unbundling of fees, but would require the disclosure of total fees. Other proposals under discussion would (1) impose an excise tax on plan sponsors and service providers for failure to meet any new fee disclosure requirements; and (2) mandate that parties satisfy all fee disclosure requirements as a condition of the prohibited transaction exemptions relating to the payment of fees.

## Impact of Pending Legislation and Action Steps for Fiduciaries

Although the legislative process is in the early stages, it is clear that Congress intends to keep the spotlight on fees paid by retirement plans, particularly 401(k) plans. Plan fiduciaries should conduct a thorough fee audit for all of their tax-qualified retirement plans. In the fee audit, fiduciaries should determine the total amount of fees paid from plan assets and evaluate the reasonableness of those fees for the services that are provided to the plan. Whenever possible, fees should be negotiated with providers. Plan fiduciaries should also review all disclosures made to plan participants for accuracy and effectiveness. Meticulous documentation of the fee review process is strongly recommended.

The Employee Benefits and Executive Compensation lawyers at Potter Anderson & Corroon stand ready to support our clients in these efforts to satisfy their fiduciary obligations. We will update you periodically on the progress of the Miller Bill and other legislative proposals so that you can position your organization and your qualified retirement plans for successful compliance with ERISA.