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ERISA Protections Provide Guidance for Social Security Privatization

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ERISA Protections Provide Guidance for Social Security Privatization

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I. Introduction

The Social Security system might transform wholly or partially into an individual account system wherein participants may invest some or all of their investment assets in personal accounts. If this transformation occurs, the par-

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ticipants will bear some degree of investment risk for their investment selections.

Minimization of the participants' investment risk is in the interest of both the participants and the Social Security sponsor, the U.S. government. Participants need to protect their retirement assets from reduction or elimination and the U.S. government does not want to have to provide retirement assets to those unfortunate participants who make poor investment decisions.

This article will describe certain steps taken by the United States Department of Labor (DOL), pursuant to its authority under the Employee Retirement Income Security Act of 1974 (ERISA),¹ to address the issue of investment risk for participants covered by individual account pension plans in the private sector. The DOL took these steps in the form of rulings and regulations issued in the past twenty years. These rulings and regulations provide a model of "best practices" that one might consider adopting in the development of an individual account program for Social Security.

A Board of Trustees charged with fiduciary duties and responsibilities could implement the adopted protective measures. Such a board might resemble the Federal Thrift Savings Board that oversees the Thrift Savings Plan, which is an individual account plan for federal employees.² Alternatively, the board might resemble the State Board of Administration that will implement and operate the Public Employee Optional Retirement Program (PEORP), an individual account plan recently established in Florida for state employees.³ If the Board approach is unacceptable, an existing or newly created federal agency could assume responsibility for implementing protective measures.

II. DOL ERISA Protections – ERISA § 404(c) and the General Fiduciary Standard Applicable to the Selection of Investment Options and Service Providers

A. ERISA § 404(c)

In the case of a pension plan that provides for individual accounts and allows a participant or beneficiary to exercise control over the investment of the participant's assets, compliance with § 404(c) would mean that the participant or beneficiary would not be a fiduciary and that no other fiduciary would be liable for any loss resulting from the exercise of such control.⁴ Although the drafters of § 404(c) intended to protect plan sponsors from fiduciary liability for investment decisions made by the sponsors' workers, the rules

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1. 29 U.S.C. §§ 1001-1461 (1994).
 2. See 5 U.S.C. §§ 8471-8479 (2000) (describing Thrift Savings Plan).
 3. FLA. STAT. ANN. § 121.4501(8) (West 2001).
 4. 29 U.S.C. § 1104(c) (1994).

adopted by the DOL to define the scope of § 404(c) create important protections for workers that substantially reduce investment risk.

A plan generally satisfies the requirements of ERISA § 404(c) if the plan provides a participant or beneficiary with: (A) the opportunity to exercise independent control over assets in his or her account, and (B) the opportunity to choose, from a broad range of alternatives, the investment vehicle for the assets in his or her account.⁵ The PEORP incorporates the § 404(c) regulations.⁶

1. Opportunity to Exercise Control

A participant does not have the "opportunity to exercise control over assets in his [or her] individual account" unless (1) the participant is given the opportunity to provide investment instructions (in writing or otherwise with the opportunity to receive written confirmation) to a plan fiduciary obligated to carry out such instructions, and (2) the participant receives or has an opportunity to obtain information sufficient to make an informed investment decision.⁷ However, a participant does not exercise "independent control in fact" if the participant is subject to improper influence, if a plan fiduciary conceals material non-public facts from the participant, or if the participant is legally incompetent and the plan fiduciary accepts the participant's investment instruction with knowledge that the participant is legally incompetent.⁸

a. Investment Instructions

Under an ERISA § 404(c) plan, a plan fiduciary generally must follow the investment instructions of the participants or beneficiaries. However, a plan may impose reasonable restrictions on the frequency of investment instructions as long as, with respect to each investment option, such restrictions allow participants and beneficiaries to react with sufficient frequency to the reasonably expected market volatility of a particular investment.⁹

A plan must allow participants to provide investment instructions at least quarterly with respect to three core investment options constituting a "broad range" of investments.¹⁰ However, if the plan allows participants to make investment instructions with respect to any other investment option more frequently (e.g., monthly), the plan must allow participants to provide invest-

5. 29 C.F.R. § 2550.404c-1(b) (2000).

6. FLA. STAT. ANN. § 121.4501(15) (West 2001).

7. 29 C.F.R. § 2550.404c-1(b)(2)(i).

8. 29 C.F.R. § 2550.404c-1(c)(2).

9. 29 C.F.R. § 2550.404c-1(b)(2)(ii)(C).

10. 29 C.F.R. § 2550.404c-1(b)(2)(ii)(C)(1); *see also infra* Part II.A.1.a (discussing fiduciaries' duties in selecting investment options).

ment instructions with the same frequency for one of the broad range investments, or must allow the participant to transfer his or her assets from such other investments into a low risk account (e.g., a money market account) and from such low risk account into a broad range investment with the same frequency allowed for such broad range investments.¹¹ If the plan allows participants to invest in employer securities, the participant must be able to provide investment instructions with respect to all broad range investment options as frequently as the participant may provide investment instructions with respect to the employer securities, or the participant must be able to transfer his or her assets from employer securities into a low risk account and from such low risk account into a broad range investment as frequently as the participant may provide investment instructions for broad range investments.¹²

A plan may charge the participant's accounts a reasonable expense for executing the participant's investment instructions, provided that participants periodically receive notice of such expense.¹³ Although the plan fiduciary who receives investment instructions from the participant or beneficiary has a general obligation to carry out such instructions, the fiduciary may decline to implement the instructions when such implementation would result in a transaction prohibited by ERISA or the Internal Revenue Code, or would generate taxable income to the plan.¹⁴ A fiduciary may also decline to implement any investment instruction that does not accord with the terms of a plan document or an instrument consistent with ERISA that would cause a fiduciary to own foreign assets in violation of ERISA, jeopardize the plan's tax qualified status, or cause the participant to suffer excessive losses.¹⁵

According to the DOL, when a plan provides participants the opportunity to exercise control over their assets and to choose from a broad range of assets, such plan would not lose its ERISA § 404(c) status merely because a fiduciary overrides an individual's investment instructions if continuing to follow such instructions would not be prudent.¹⁶ However, the plan fiduciary's exercise of control over the investment decision would supersede the individual's exercise of control and the transactional relief under ERISA § 404(c) would be unavailable.¹⁷

11. 29 C.F.R. § 2550.404c-1(b)(2)(ii)(C)(2) (2000).

12. 29 C.F.R. § 2550.404c-1(b)(2)(ii)(C)(3).

13. 29 C.F.R. § 2550.404c-1(b)(2)(ii)(A).

14. 29 C.F.R. § 2550.404c-1(b)(2)(ii)(B).

15. 29 C.F.R. § 2550.404c-1(d)(2)(ii).

16. See Dept. of Labor Adv. Op. No. 96-02A (Feb. 9, 1996) (referring specifically to situation in which fiduciary could not locate participant or beneficiary). It is unclear whether the opinion applies with equal force to situations in which the participant or beneficiary is readily available. *Id.*

17. *Id.*

b. Sufficient Investment Information

For purposes of ERISA § 404(c), a participant does not have "sufficient investment information" unless an identified plan fiduciary makes certain mandatory disclosures to the participant or beneficiary automatically and, upon the participant's request, provides certain additional investment information.¹⁸ Specifically, an identified plan fiduciary must disclose the following information:

- A description of investment alternatives, including (a) general investment objectives, (b) risk and return characteristics, (c) type and diversification of assets, (d) names of the investment managers, and (e) transaction fees and expenses that directly affect the participant's account balance (e.g., commissions, sales loads, and redemption or exchange fees).¹⁹
- An explanation of (a) the investment instruction-giving process, (b) any limitation on investment instructions, and (c) any restrictions on the exercise of voting, tender, and similar rights under the investments.²⁰
- The name, address, and phone number of the plan fiduciary responsible for making the required disclosures.²¹
- If the plan allows participants directly or indirectly to invest in employer securities, a description of the procedures established to maintain confidentiality with respect to the purchase, holding, and sale of the securities and the exercise of voting, tender, and similar rights, as well as the name, address, and phone number of the fiduciary responsible for monitoring compliance with the procedures.²²
- A copy of the most recent prospectus for each available investment option registered under the Securities Act of 1933 (provided before or immediately after a participant first invests).²³
- Materials provided to the plan relating to voting, tender, or similar rights under the plan.²⁴

18. 29 C.F.R. § 2550.404c-1(b)(2)(i)(B) (2000).

19. 29 C.F.R. §§ 2550.404c-1(b)(2)(i)(B)(1)(ii), (iii), (v).

20. 29 C.F.R. § 2550.404c-1(b)(2)(i)(13)(1)(iv).

21. 29 C.F.R. § 2550.404c-1(b)(2)(i)(B)(1)(vi).

22. 29 C.F.R. § 2550.404c-1(b)(2)(i)(B)(1)(vii).

23. 29 C.F.R. § 2550.404c-1(b)(2)(i)(B)(1)(viii) (2000). Some plan investment vehicles, such as Common/Collective trusts, would not be described by a prospectus, and in that event, this requirement is inapplicable. See 4 RESEARCH INST. OF AM., PENSION COORDINATOR § 54217 (2001), available at <http://www.riachekpoint.com> (last visited Oct. 19, 2001) (suggesting requirement extends only to investment alternatives subject to Securities Act of 1933).

24. 29 C.F.R. § 2550.404c-1(b)(2)(i)(B)(1)(ix) (2000).

Upon request by a participant, the fiduciary must furnish a participant or beneficiary with the following information:

- The annual operating expenses for each selected investment (expressed both in dollars and as a percentage of the average net asset value).²⁵
- Copies of any prospectuses, financial statements and reports, or other materials provided to the plan (including a list of assets comprising the portfolio of each investment option).²⁶
- Current values and historical investment performance, net of expenses, of each investment option available under the plan, and the current value of the shares or investment option interests held in the participant's account.²⁷

The regulations do not mandate specific procedures for plans providing information to participants on request. According to the DOL, however, the regulations describe the informational requirements in general terms "in order to afford plan fiduciaries and plan sponsors the flexibility necessary to accommodate the variations in plan design and investment alternatives which may be available to participants and beneficiaries."²⁸

Although the DOL encourages plan fiduciaries to provide investment education services to participants, § 404(c) specifically disclaims any requirement that plan fiduciaries provide investment advice or investment education to assist participants in making investment decisions.²⁹ Provision of the information specified by § 404(c) would appear to satisfy the disclosure requirements of § 404(c). However, one court has suggested that relief under ERISA § 404(c) is not available unless the plan provides information sufficient for an average participant to understand and assess matters such as the following: the control that the plan permits the participant to exercise and the financial consequences the participant assumes by exercising control, the rights provided to participants and the obligations imposed upon fiduciaries, the terms and operating procedures of the plan, the investment alternatives offered under the plan and the investments in which assets of each fund are placed, the financial condition and performance of the investments, and the developments that materially affect the financial status of the investments.³⁰ More

25. 29 C.F.R. § 2550.404c-1(b)(2)(i)(B)(2)(i).

26. 29 C.F.R. §§ 2550.404c-1(b)(2)(i)(B)(2)(ii), (iii).

27. 29 C.F.R. §§ 2550.404c-1(b)(2)(i)(B)(2)(iv), (v).

28. Participant Directed Individual Account Plans, 57 Fed. Reg. 46,906, 46,912 (Oct. 13, 1992) (codified at 29 C.F.R. pt. 2550).

29. 29 C.F.R. § 2550.404c-1(c)(4) (2000). See Interpretive Bulletin Relating to Participant Investment Education, 29 C.F.R. § 2509.96-1 n.1 (2000) (interpreting what information constitutes investment advice and investment information).

30. See *In re Unisys Sav. Plan Litig.*, 74 F.3d 420, 447 (3d Cir. 1996) (assessing prerequisites for fiduciary to prevail under 29 U.S.C. § 1104(c)).

generally, courts have held that misinformation or a failure to provide relevant information may constitute a breach of fiduciary duty.³¹

Another court has suggested that, in the case of participant-directed plans, ERISA's fiduciary responsibility provisions require that plan fiduciaries provide participants with notice and information about changes sufficient to allow participants the opportunity to make investment decisions and to prevent them from being misled or misinformed.³²

2. Broad Range of Investments

An ERISA § 404(c) plan must permit participants to choose independently from among a "broad range" of investment alternatives for the assets in their individual accounts. The plan must allow participants to invest in a number of investment options sufficient to give the participants a reasonable opportunity to materially affect the potential return on their investments.³³ According to the DOL, the selection or designation of investment alternatives offered under a plan remains the responsibility of the fiduciaries of a participant-directed plan unless the plan permits participants to select any investment vehicle that is administratively available.

a. Core Investments

The plan must offer at least three "core" investment options, each of which is diversified as to type of investment, has materially different risk and return characteristics, and when aggregated together and with other investments available under the plan, allows participants to diversify their investments and minimize the overall risk of their account.³⁴ Look-through investment vehicles, such as mutual funds, collective trusts, and pooled separate accounts, qualify as "core" options, and in determining whether the plan satisfies the diversification requirements, one may consider the underlying assets of such vehicles.³⁵

The authorizing statute for the Thrift Saving Plan does not incorporate ERISA § 404(c) requirements. However, it limits investment choices. The Board may invest in only five broad funds. In the case of the equities fund, the investment must match a "commonly recognized index . . . which is a rea-

31. See *id.* (citing various court decisions establishing that fiduciary obligations may impose negative duty not to misinform and affirmative duty to inform under some circumstances).

32. See *Franklin v. First Union Corp.*, 84 F. Supp. 2d. 720, 735 (E.D. Va. 2000) (discussing fiduciary obligations of notice in making amendments to existing plan).

33. 29 C.F.R. § 2550.404c-1(b)(3)(i)(A) (2000).

34. 29 C.F.R. §§ 2550.404c-1(b)(3)(i)(B).

35. 29 C.F.R. § 2550.404c-1(b)(3)(ii).

sonably complete representation of the U.S. equity markets.³⁶ The Board of the Thrift Savings Plan acts as a fiduciary when selecting these investments.³⁷

b. Self-Directed Brokerage Options

The § 404(c) regulations provide that a minimum of three diversified investment alternatives may satisfy the requirements, and thus the fiduciaries of a § 404(c) plan may designate more than three investment alternatives.³⁸ In addition to, or as an alternative to, designating investment options, the plan might include a self-directed brokerage option (SDO).

One type of SDO is a "mutual fund window," which allows participants to direct the investment of their account balances among a universe of mutual funds.³⁹ In some cases, thousands of mutual funds might be available. Another type of SDO permits participants to open "brokerage accounts," and the participants may direct a broker to invest individual plan assets in almost any publicly traded securities.⁴⁰

When a plan offers participants an SDO alternative, some of the protections afforded participants under the § 404(c) regulation may not apply. For example, the § 404(c) regulations require that participants receive "information sufficient to make informed decisions with regard to investment alternatives available under the plan."⁴¹ The regulations identify the specific information required and distinguish between "designated" and other investment alternatives. A "designated investment alternative is a specific investment identified by a plan fiduciary as an available investment alternative under the plan."⁴² Plan fiduciaries must automatically provide a description of each designated investment alternative, including its investment objective, its risk and return characteristics, and the type and diversification of its

36. See 5 U.S.C. § 8438 (b)(2)(A) (2000) (describing Common Stock Index Investment Fund). The five options are a Government Securities Investment Fund, a Fixed Income Investment Fund, a Common Stock Index Investment Fund, a Small Capitalization Stock Index Investment Fund, and an International Stock Index Investment Fund. 5 U.S.C. § 8438(b)(1) (2000).

37. 5 U.S.C. § 8477(b)-(c) (2000).

38. 29 C.F.R. § 2550.404c-1(b)(3)(i)(B) (2000).

39. *Self-Directed Brokerage Accounts in Demand by Employees, Survey Finds, Pens. & Ben. Rep. (BNA)* (Mar. 22, 2001); Anne Willette, *Trends Often Start at Big Firms*, USA TODAY, Nov. 24, 1997, at 3B.

40. *Hearing on H.R. 2269, The Retirement Security Advice Act, the Subcomm. on Employer-Employee Relations, House Comm. on Education and the Workforce*, 107th Cong., available at <http://www.edworkforce.house.gov/hearings/10th/ee/hr2269-71701/combs> (last visited Oct. 23, 2001) (statement of Assistant Secretary Ann L. Combs, Pension & Welfare Benefits Administration, Dep't of Labor); Willette, *supra* note 39, at 3B.

41. 29 C.F.R. § 2550.404c-1(b)(2)(B) (2000).

42. 29 C.F.R. § 2550.404c-1(e)(4).

assets.⁴³ A specific description of investment alternatives other than "designated investment alternatives" is not required.⁴⁴ If an investment alternative is not a "designated alternative," participants need receive automatically only strictly limited information: a general description of the alternatives, i.e., the types of investments available through the mutual fund window, and if the participant invests in an investment alternative registered under the Securities Act of 1933 (including any mutual fund), a prospectus.⁴⁵ Any prospectuses, financial statements, or reports furnished to the plan would still be provided to participants upon request.⁴⁶

When a plan offers a very broad universe of investment alternatives, the plan fiduciary should have neither a fiduciary responsibility to determine whether investments selected by a participant are appropriate nor a duty to monitor the participant's investment selection because the fiduciary arguably does not "designate" any particular investment alternatives. Thus, when a plan permits participants to invest through a brokerage account, the fiduciary arguably has not designated any of the securities in such account. However, when a plan offers a limited number of mutual funds under a mutual fund window, the argument that such mutual funds are not "designated" may be weaker. Although a plan fiduciary under ERISA § 404(c) might avoid the automatic disclosure requirement if each security available in a brokerage account or window is not a "designated investment," the DOL has not addressed this issue and might conclude otherwise.

B. General ERISA Fiduciary Standards Applicable to the Selection of Investment Options and Service Providers

The general fiduciary standards of ERISA § 404(a)(1)(A)-(C) require that plan fiduciaries act prudently and use plan assets solely for the purpose of paying plan expenses and reasonable plan benefits.⁴⁷ A fiduciary may satisfy these obligations by following a "procedurally prudent" process in which the fiduciary employs appropriate methods to investigate and determine the merits of a particular course of action and then acts accordingly. Generally, such a process requires the impartial study of the transaction's advantages and disadvantages, the exercise of diligence in all aspects of the transaction, and the acquisition and reliance upon up-to-date information. In following a proce-

43. 29 C.F.R. § 2550.404c-1(b)(2)(i)(B)(1)(ii).

44. *Id.*

45. 29 C.F.R. § 2550.404c-1(b)(2)(i)(B)(2).

46. 29 C.F.R. § 2550.404c-1(b)(2)(i)(B)(1)(viii).

47. Similar standards apply to the Thrift Savings Board, 5 U.S.C. § 8477(b) (2000), and to the Florida State Board of Administration. FLA. STAT. ANN. §§ 121.4501(15)(a), 112.656 (West 2001).

durably prudent process, fiduciaries must retain qualified experts and consultants whenever fiduciaries do not possess the skills to conduct an adequate investigation. Fiduciaries typically engage consultants to assist in the establishment of investment policies, to evaluate the quality of proposed providers, and to develop comparative cost information about the proposed service providers and investment products.

Although ERISA § 404(c) protects plan fiduciaries from liability arising out of investment decisions made by a participant exercising control over the participant's assets, the DOL has stated that the act of designating investment alternatives (including look-through investment vehicles and investment managers) in an ERISA § 404(c) plan is a fiduciary function not protected by § 404(c) liability limitations.⁴⁸ Thus, all of the ERISA fiduciary provisions apply to both the initial designation of investment alternatives and to investment managers and the ongoing determination that such alternatives and managers remain suitable and prudent for the plan.⁴⁹

1. Selection of Investment Products

There are several different criteria pertinent to the evaluation of investment products and providers. Fiduciaries should consider the investment performance of selected investment vehicles. Fiduciaries should also consider the costs and fees of particular investments and the extent to which such costs and fees may affect investment returns.⁵⁰ Because every investment necessarily causes a plan to forgo other investment opportunities, fiduciaries must consider the expected return on alternative investments with risks similar to the plan.⁵¹ An investment would not be prudent if the fiduciary expected such investment to provide a plan with a lower return than alternative available investments with commensurate degrees of risk or to be riskier than alternative available investments with commensurate rates of return.⁵²

A fiduciary should also consider the role of a particular investment in a plan's portfolio, and thus take into account factors such as diversification, liquidity, and risk/return characteristics.⁵³ This evaluation should consider provisions of the § 404(c) regulations that govern the selection of investment options for participant-directed plans.⁵⁴

48. Dep't of Labor Adv. Op. No. 98-04A (May 28, 1998).

49. 57 Fed. Reg. 46,906, 46,922 (Oct. 13, 1992) (codified at 29 C.F.R. pt. 2550).

50. Letter from Bette J. Briggs, Chief, Division of Fiduciary Interpretations, U.S. Dep't of Labor, to Douglas O. Kant, FMR Corp. (Nov. 26, 1997) (on file with U.S. Dep't of Labor).

51. Dep't of Labor Adv. Op. No. 98-04A (May 28, 1998).

52. Interpretive Bulletin Relating to the Fiduciary Standard Under ERISA in Considering Economically Targeted Investments, 29 C.F.R. § 2509.94-1 (2000).

53. Dep't of Labor Adv. Op. No. 98-04A (May 28, 1998).

54. See *supra* Part II.A (discussing § 404(c) regulations).

The DOL stated that the fiduciary standards do not preclude consideration of non-economic factors ("collateral benefits") in the evaluation of a particular investment opportunity.⁵⁵ However, collateral benefits may only be considered in the investment choice if the fiduciary expects the investment to provide an investment return commensurate with other investments of similar risk.⁵⁶ Thus, a fiduciary may not rely upon non-economic factors unless the investment, judged solely on the basis of its economic value, appears equal to or superior to alternative investments, considering the diversification, liquidity, and risk/return characteristics of the investment in the plan's investment portfolio.

Plan fiduciaries could offer a "socially responsible" investment fund only if the fund, when judged solely on the basis of its economic value, would be equal to or superior to alternative available investments.⁵⁷ Similarly, it is arguable that fiduciaries cannot offer investment products or services to participants (even if requested by participants) to the extent that such products or services are inconsistent with the objective of accumulating retirement plan benefits on behalf of participants. For example, fiduciaries may refuse to offer high-risk investment products even though participants may request such products.

2. Selection of Investment Service Providers

A plan services selection process that is procedurally prudent requires an investigation into the requirements of the plan and its participants. Once the investigation establishes such requirements, the fiduciary may select plan investment and service arrangements, taking into account the cost of services, the quality of services, and the qualifications of the provider.⁵⁸ The fiduciary must also evaluate the performance and suitability of investment choices. In addition, some special considerations apply in the context of service arrangements that combine investment and administrative services into a single, "bundled" service arrangement.⁵⁹

55. Dep't of Labor Adv. Op. No. 98-04A (May 28, 1998).

56. *Id.*

57. *Id.*

58. See Letter from Bette J. Briggs, Chief, Division of Fiduciary Interpretations, U.S. Dep't of Labor, to Diana Ceresi, Assoc. Gen. Counsel, SEIU, AFL-CIO, CLC (Feb. 19, 1998) (on file with U.S. Dep't of Labor) [hereinafter Briggs 1998 Letter] (discussing standards applicable to selection of health care providers); Letter from Bette J. Briggs, Chief, Division of Fiduciary Interpretations, U.S. Dep't of Labor, to Theodore Konshak, Negotiated Pension Plans, Ltd. (Dec. 1, 1997) (on file with U.S. Dep't of Labor) (discussing criteria applicable to selecting plan actuary); see also *Liss v. Smith*, 991 F. Supp. 278, 300 (S.D.N.Y. 1998) (stating that fiduciary trustees have obligation to select provider whose service level, quality, and fees best match plan's needs and financial situation); *McLaughlin v. Bendersky*, 705 F. Supp. 417, 420 (N.D. Ill. 1989) (stating that measurement of fiduciary's duty is one of objective reasonableness with respect to cost of plan services relative to quality of such services).

59. See *supra* text at Part IIA.2.6 (stating that responsibility of plan fiduciaries to select,

a. Identification of Plan Requirements

The first step of a procedurally prudent process for selecting plan service arrangements is the evaluation of the needs of the plan and its participants. A DOL brochure prepared for fiduciaries who select investments and services for participant-directed plans subject to ERISA (the "Employer Brochure") explains that employers should consider the specific services that the plan requires. Such considerations include the type and frequency of reports, the requisite communications to participants, the necessary educational materials and meetings for participants, the availability and frequency of participant investment transfers, the level of responsibility the service provider will assume, and the optional features involved, such as loans, Internet trading, and telephone transfers.⁶⁰ Similarly, courts have held that fiduciaries who select plan service arrangements must determine the needs of the plan's participants and take such needs into account in the determination of what service level, quality, and fees best match the plan's needs and financial situation.⁶¹

b. Costs

In the Employer Brochure, the DOL explains that the cost of plan services, including investment services, is a key consideration in selecting plan investments and services. Specifically, the Employer Brochure provides the following: "Understanding fees and expenses is important in providing for the services necessary for your plan's operation. This responsibility is ongoing. After careful evaluation during the initial selection, the plan's fees and expenses should be monitored to determine whether they continue to be reasonable."⁶² To further emphasize the importance of cost considerations, the Employer Brochure explains that "[f]ees and expenses can have a significant impact on your employees' retirement savings."⁶³ The Employer Brochure also provides ten questions that employers may use to focus their evaluation of the fees and expenses that the plan may pay.⁶⁴

review, and monitor investment alternatives is unclear when alternatives, as in case of some SDOs, are not "designated" under § 404(c) regulation).

60. U.S. DEP'T OF LABOR, A LOOK AT 401(K) PLAN FEES . . . FOR EMPLOYERS, available at <http://www.dol.gov/dol/pwba/public/pubs/401kt700.htm> (last visited Oct. 19, 2001) [hereinafter 401(K) PLAN FEES].

61. See *Liss*, 991 F. Supp. at 300 (stating that trustees are obligated to determine needs of plan participants, review services and fees of providers, and to select provider best matching needs and financial situation of plan); *Whitfield v. Tomasso*, 682 F. Supp. 1287, 1304 (E.D.N.Y. 1988) (stating that fiduciary obligation includes consideration of participant needs).

62. 401(K) PLAN FEES, *supra* note 60.

63. *Id.*

64. *Id.* These questions include the following:

Do you know which fees and expenses are charged directly to the plan and which are deducted from investment returns?

DOL interpretations suggest that fiduciaries should evaluate plan fees in light of the "total cost" resulting from the provider's services, including those costs associated with investment and administrative services.⁶⁵ In connection with the Employer Brochure, the DOL issued an optional uniform fee disclosure format (the "401(k) Plan Fee Disclosure Form"), which fiduciaries may use to determine the "total cost" of services associated with a plan.⁶⁶ According to the form, fiduciaries may compare investment product fees and plan administration expenses charged by competing providers, regardless of how the particular service providers structure fees, through a determination of a plan's "total cost."⁶⁷

Although cost is a key factor that fiduciaries should consider when selecting plan investments and services arrangements, it is not the only factor of concern.⁶⁸ As the Employer Brochure explains, "[c]heaper is not necessarily better."⁶⁹ In the introduction to the 401(k) Plan Fee Disclosure Form, the Department of Labor explains:

Selecting a service provider requires that you evaluate and differentiate services offered by competing companies. Cost is one of the criteria, but not the only criterion, for making this evaluation. Other factors of equal or greater importance to consider include the quality and type of services provided, the anticipated performance of competing providers and their investment products and other factors specific to your plan's needs. *The*

Do you understand that some investment options have higher fees than others because of the nature of the investment?

Does the prospective arrangement have any restrictions, such as charges for early termination of your relationship with the provider?

Have you considered asking potential providers to present uniform fee information that includes all fees charged?

Id.

65. See generally 401(K) PLAN FEES, *supra* note 60.

66. U.S. DEP'T OF LABOR, PENSION AND WELFARE BENEFITS ADMINISTRATION, 401(K) PLAN FEE DISCLOSURE FORM, at 1, available at <http://www.dol.gov/cgi-bin/consolid.pl?media+reports> (last visited Jan. 14, 2002).

67. *Id.*

68. Indeed, some DOL interpretations and cases indicate that it may be imprudent for fiduciaries to consider only cost in the selection of service providers. See Interpretive Bulletin Relating to the Fiduciary Standard Under ERISA When Selecting an Annuity Provider, 29 C.F.R. § 2509.95-1(d) (stating that "increased costs could never justify putting the benefits of annuitized participants and beneficiaries at risk by purchasing an unsafe annuity"); Briggs 1998 Letter, *supra* note 58 (explaining that plan fiduciary's failure to consider quality in selecting health services provider may be breach of fiduciary duty); see also *Bussian v. RJR Nabisco, Inc.*, 223 F.3d 286, 302 (5th Cir. 2000) ("[A]n annuity's price cannot be the motivating factor until the fiduciary reasonably determines, through prudent investigation, that the providers under consideration are comparable in their ability to promote the interests of participants and beneficiaries.").

69. 401(K) PLAN FEES, *supra* note 60.

*service provider offering the lowest cost services is not necessarily the best choice for your plan.*⁷⁰

c. Quality of Services/Provider Qualifications

The DOL's Advisory Council on Employee Welfare and Pension Benefit Plans has issued a report that explains how fiduciaries should select plan service providers.⁷¹ This report indicates that fiduciaries should consider the following matters in the evaluation of the quality of services: the service provider's objective qualifications to provide services, including business structure, size of staff, relevant education, professional certifications and experience, references, professional registrations (if applicable), technical capability, financial condition and capitalization, pending enforcement actions or litigation, and the reasons why the service provider has been terminated by others; the provider's track record for delivering accurate and timely record-keeping and other administrative services and insuring regulatory compliance; whether the service provider is financially stable and committed to the business for the long term; whether the provider offers a wide range of options that will allow participants to make appropriate asset allocation objectives and achieve their investment objectives; the provider's demonstrated ability to generate superior investment performance over time; the provider's administrative capability to provide assistance with matters such as employee enrollment, investment education, and ongoing communication; whether the provider's service representatives are knowledgeable and dependable; and procedures in place to ensure that any mistakes by the provider will be disclosed to the fiduciary and corrected.⁷²

d. Bundled Service Arrangements

Service providers supply "bundled service" arrangements that combine services such as custodial duties, recordkeeping duties, plan administration, and plan investment choices. Under some bundled service arrangements, providers offer certain "free" services if fiduciaries purchase other services (usually investment management services) that the provider offers.

In the case of these arrangements, the DOL recognizes that plan fiduciaries are entitled to review the arrangement in its entirety, as opposed to an individual evaluation of each component.⁷³ For example, fiduciaries may

70. 401(K) PLAN FEES, *supra* note 60.

71. ADVISORY COUNCIL ON EMPLOYEE WELFARE & PENSION BENEFIT PLANS, REPORT OF THE WORKING GROUP ON GUIDANCE IN SELECTING & MONITORING SERVICE PROVIDERS, available at <http://www.dol.gov/dol/pwba/public/adccoun/srvpro/htm> (last visited Nov. 6, 2001).

72. *Id.*

73. See ABA Joint Committee on Employee Benefits, Q&A Session with U.S. Depart-

review the reasonableness of the entire fee charged under a bundled service arrangement instead of analyzing the amount paid for each particular service.⁷⁴ Nevertheless, plan fiduciaries should compare the costs of a bundled service arrangement with the cost of equivalent bundled programs or separately procured services and funds.⁷⁵ The "total cost" approach taken in the 401(k) Plan Fee Disclosure Form can facilitate such comparison.

The DOL has also agreed that plan fiduciaries may consider the value of "one-stop shopping," or the administrative convenience and associated benefits of a single bundled arrangement, in the selection of a bundled service arrangement.⁷⁶ The DOL recognizes that the fiduciary may sometimes accept lesser quality of the plan's funds by doing so, provided that the investments meet a "basic" prudence standard.⁷⁷ In this situation, fiduciaries have the discretion to determine what combination of investment products and services best serves the plan.⁷⁸

ERISA's prohibited transaction rules generally prohibit bundled providers from providing participants of ERISA-covered plans investment "advice" with respect to their own products.⁷⁹ Indeed, DOL officials have commented that a bundled provider's interest in the success of its investment products may affect its ability to provide unbiased investment advice. In recent years

ment of Labor, Answer 16 (May 11, 1994) (stating that "[o]ne can look at the entire fee so there is no need to analyze each separate fee in the bundled services" for reasonableness).

74. *Id.*

75. Letter from Bette J. Briggs, Chief, Division of Fiduciary Interpretations, U.S. Dep't of Labor, to Douglas O. Kank, FMR Corp. (Nov. 26, 1997) (on file with U.S. Dep't of Labor).

76. ABA Joint Committee on Employee Benefits, Q&A Session with U.S. Department of Labor, Answer 17 (May 11, 1994).

77. *Id.*

78. *See id.* ("The determination of what combination is best must be made by the appropriate plan fiduciary.")

79. *See* 29 C.F.R. § 2510.3-21(c) (1994) (discussing ability of fiduciary to render investment advice to plan participant); 29 U.S.C. § 1002(21) (1994) (defining plan fiduciary). Interpretations of ERISA distinguish between investment information and education programs and "investment advice." For example, the DOL views general discussions about financial planning concepts, objective descriptions of investment options, and asset allocation models provided under certain conditions as investment education. *See* Interpretive Bulletin Relating to Participant Investment Education, 29 C.F.R. § 2509.96-1 (2000) (setting out general criteria that DOL will consider when determining whether plan fiduciary provides investment advice or investment education). On the other hand, when a participant receives individualized recommendations and there is an oral or written agreement that the participant may rely on such recommendations when making investment decisions, "investment advice" may have been provided. *See* 29 C.F.R. § 2510.3-21(c) (2000) (setting out criteria for determining when person gives independent advice). Under ERISA, a person that provides investment advice will be deemed to be a fiduciary and may be responsible for losses and may have to disgorge profits resulting from the advice. *See* 29 U.S.C. § 1002(21) (1994) (defining plan fiduciary).

the DOL has issued individual exemptions from ERISA's prohibited transaction rules for programs offering advisory services to participants only if either an independent third-party provides the advice or if a "fee-leveling" arrangement reduces the bundled providers' conflict in providing advice.⁸⁰ However, some existing class exemptions issued by the DOL allow for provision of investment advice by mutual fund underwriters and investment advisors with respect to their own products under certain conditions, including disclosure and consent.⁸¹

III. Conclusion

If Social Security transforms wholly or partially into an individual account system, participants will assume some degree of the investment risk for their investment decisions. In order to protect participants and to relieve pressures upon the U.S. government to make up the difference of participants' investment losses, this Article recommends that legislators examine protective DOL regulations and ERISA rulings and incorporate them into any new Social Security legislation.

80. See Dep't of Labor Adv. Op. No. 97-15A (May 22, 1997), available at <http://www.dol.gov/dol/pwba/public/programs/ori/advisory97/97-15a.htm> (stating that fee-leveling arrangement that eliminates bundled provider's pecuniary interest in advising certain investments would avoid violation of ERISA's prohibited transactions rules); Olena Berg, *Washington Update: DOL Sets the Record Straight on Investment Advice*, 401(K) ALERT (May 1998), at 2, 3 (stating that if "a plan sponsor offers participants a single session with a third-party investment advisor, and the plan sponsor and the advisor make it clear that they do not intend participants to use this single session as the primary basis for deciding how to invest, it would not be considered to be investment advice leading to fiduciary status").

81. See Prohibited Transaction Exemption 84-24, amending and superceding Prohibited Transaction Exemption 77-9, 49 Fed. Reg. 13,208 (Apr. 3, 1984) (providing relief for purchase or sale of securities issued by investment company when investment company underwriter also provides advice to plan); Prohibited Transaction Exemption 77-4, 42 Fed. Reg. 18,732 (Apr. 8, 1977) (providing relief for sale or purchase of shares of registered open-end investment company when investment advisor is plan fiduciary and is not employer of employees covered by plan).