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Articles in this Edition

RECENT LEGISLATIVE ACTIVITY

Additional Details, Guidance Available for Miscellaneous Stimulus Bill Provisions

The Recovery and Reinvestment Act (H.R. 1, commonly known as the "stimulus package"), was signed into law by President Obama on February 17 and contains a number of miscellaneous benefits provisions (in addition to the COBRA premium subsidy).

One of these provisions mandates the same allowable dollar amounts for public transportation as it does for private or personal transportation (parking). Under the new law, effective March 1 and through December 31, 2010, the maximum tax-free mass transit benefits employers can make available to employees will increase from $120 to $230 per month. Under current law, employers are permitted to offer tax-free transit and parking benefits up to certain monthly limits, adjusted annually for inflation. (The 2009 limit for parking benefits will remain the same at $230 per month.)

The stimulus bill also included a number of provisions affecting executive pay, including an annual non-binding "say-on-pay" vote for shareholders of companies participating in the Troubled Asset Relief Program (TARP) to approve executive compensation. The Securities and Exchange Commission (SEC) has issued guidance on the requirement, which became effective Feb. 17, 2009, applicable to preliminary or definitive proxy statements filed with the Commission after that date.

President Obama Budget Analysis: Health and Retirement Plan Initiatives

President Obama released his Fiscal Year 2010 budget outline carving out federal revenue for, among other items, the establishment of health and retirement benefit initiatives.

Health

The President's budget does not contain specific provisions for comprehensive health care reform, as those details will likely be guided collaboratively with Congress. The budget does, however, identify eight principles to which reform measures should adhere. The following is excerpted from the preliminary budget document:

- *Protect Families' Financial Health.* The plan must reduce the growing premiums and other costs American citizens and businesses pay for health care. People must be protected from bankruptcy due to catastrophic illness.
- *Make Health Coverage Affordable.* The plan must reduce high administrative costs, unnecessary tests and services, waste, and other inefficiencies that consume money with no added health benefits.
- *Aim for Universality.* The plan must put the United States on a clear path to cover all Americans.
- *Provide Portability of Coverage*. People should not be locked into their job just to secure health coverage, and no American should be denied coverage because of preexisting conditions.
- *Guarantee Choice.* The plan should provide Americans a choice of health plans and physicians. They should have the option of keeping their employer-based health plan.
- *Invest in Prevention and Wellness.* The plan must invest in public health measures proven to reduce cost drivers in our system—such as obesity, sedentary lifestyles, and smoking— as well as guarantee access to proven preventive treatments.

- *Improve Patient Safety and Quality Care.* The plan must ensure the implementation of proven patient safety measures and provide incentives for changes in the delivery system to reduce unnecessary variability in patient care. It must support the widespread use of health information technology and the development of data on the effectiveness of medical interventions to improve the quality of care delivered.

- *Maintain Long-Term Fiscal Sustainability*. The plan must pay for itself by reducing the level of cost growth, improving productivity, and dedicating additional sources of revenue.

Notably, the budget does provide for a 10-year, $634 billion "reserve fund" set aside to pay for the reform effort. The fund would be partially financed through a tax hike for individuals making more than $250,000. The remainder would be generated through a series of payment reforms in Medicare and Medicaid:

- Reducing Medicare overpayments to private insurers under the Medicare Advantage program;

- Reducing drug prices, primarily through establishing a pathway for generic versions of biologic drugs and increasing the Medicaid drug rebate for brand-name drugs;

- Improving Medicare and Medicaid payment accuracy by eliminating overpayments and fraud, improving care after hospitalizations and reducing hospital readmission rates; Expanding the Hospital Quality Improvement Program to link a portion of Medicare payments for acute in-patient hospital services to hospitals' performance on specific quality measures; and

- Reforming the physician payment system to improve quality and efficiency.

Retirement

The budget contains a number of retirement savings-focused proposals President Obama had originally included in his presidential campaign material:

- All employees would be automatically enrolled in workplace pension plans, though they can opt-out if they choose. Employers who do not currently offer a retirement plan will be required to enroll their employees in a direct-deposit Individual Retirement Account that is compatible with existing direct-deposit payroll systems.

- The existing Saver's Credit would be modified to provide a 50 percent match on the first $1,000 of retirement savings for families that earn less than $65,000. The credit would be fully refundable.

The budget document estimates these retirement savings proposals to cost $13.9 billion over five years and $55.2 billion over 10 years, but does not suggest a financing method.

House Committee Hears Testimony on Financial Crisis and Retirement Security, Additional Congressional Committees Discuss Retirement Policy

On February 24, the House of Representatives Education and Labor Committee held a hearing on strengthening worker retirement security, focusing on the impact of the financial crisis on defined contribution retirement plans and the appropriateness of 401(k) plans as a component of comprehensive retirement savings. It was the first in a series of hearings to be hosted by the committee as it develops retirement reform legislation.

In an opening statement, Committee Chairman George Miller (D-CA) mentioned the three "legs" of retirement security: Social Security, traditional defined benefit pensions and defined contribution plans. "While 401(k)s are a fact of life, this committee has found that these plans in their current form do not and will not provide sufficient retirement security for the vast majority of Americans," Miller said. "We must … ask the difficult questions about the state of our nation's retirement system as a whole and look to see whether we need to create a new leg of retirement security."

Ranking Republican member Buck McKeon (R-CA) defended the current defined contribution system. "While our defined contribution system could be improved, it would be a real mistake to dismantle it, or nationalize it, as has been suggested," McKeon said. "Triggering a widespread exodus from the system would only exacerbate the market's downward trend, while cementing these deep losses."

Paul Schott Stevens, President and CEO of the Investment Company Institute testified before the committee as a representative of the retirement plan provider community. Stevens indicated that, while the 401(k) environment is unsettling, Americans continue to value and support the system. His testimony included several proposals for improving the retirement system: improved disclosure, relaxed rules for minimum required distributions, streamlined diversification from company stock, greater use of automatic features, simplified plan designs for small businesses, increased investor and financial education and an improved footing for Social Security.

The other three witnesses each offered to the committee a suggestion for overhauling the defined contribution system:

- John C. Bogle, founder and former chairman of Vanguard Group (no longer affiliated with the company), proposed a single defined contribution structure, dominated by low-cost providers and focused on index funds, overseen by a newly-created Federal Retirement Board that would establish principles of asset allocation and diversification. The plans would include mandatory low-cost annuities, though participants would be permitted to opt-out. He would also extend ERISA fiduciary requirements to plan providers and money managers as well as sponsors.

- Dean Baker, co-director of the Center for Economic and Policy Research, proposed a separate, government-run pension system that would provide a guaranteed rate of return. Under this plan, participants would provide a default contribution of three percent, with additional contributions allowed, each capped at a modest level, with subsidies provided for low-income individuals. Participants would be encouraged to take payouts in the form of annuities. The guaranteed return would be set at a level "consistent with a long-term average return on a conservatively invested portfolio." Investments would be handled by a private contractor, similar to the Federal Employees Thrift Saving Plan.

- Alicia Munnell, director of Boston College's Center for Retirement Research, suggested a "new tier of retirement income," in which participation would be mandatory, assets would be inaccessible before retirement and benefits would be paid by annuities. Munnell rejected guaranteed returns, but did favor the Federal Thrift Savings Plan model.

During the hearing's question-and-answer period, lasting nearly two hours, Committee members broached a wide variety of topics, including: increased transaction costs, differences between commercial defined contribution plans and the Federal Thrift Savings Plan, the rationale and challenges of annuity requirements, the need for improved financial literacy and additional minimum required distribution relief, the decline in the number of defined benefit plans and the dangers of the decumulation phase for plan beneficiaries.

On February 25, two congressional committees gathered to hear testimony on retirement policy. The Senate Special Aging Committee held a hearing on "Boomer Bust? Securing Retirement in a Volatile Economy," and the House of Representatives Small Business Committee held the hearing Drop in Retirement Savings: The Challenges Small Businesses Face Funding and Maintaining Retirement Plans in a Struggling Economy.

Senate Special Aging Committee

The Senate Special Aging Committee hearing examined the economic downturn's effect on retirement security with a particular focus on those individuals who are nearest retirement. Witnesses talked about the various factors affecting the ability of baby boomers to retire, including the weakened performance of 401(k) funds (and the appropriateness of target-date funds) the instability of housing values and the challenges of the labor market for older workers.

House Small Business Committee

The House Small Business Committee heard testimony from advocacy and research organizations about the effects of the current economy on small businesses' ability to sponsor retirement plans.

Neither the Senate Special Aging Committee nor the House Small Business Committee has jurisdiction over retirement policy reform legislation. However, Aging Committee Chairman Herbert Kohl (D-WI) was a sponsor of retirement plan fee disclosure legislation in the previous congress and may eventually reintroduce his bill.

Harkin, Kohl Introduce 401(k) Fee Bill in Senate

Senators Tom Harkin (D-IA) and Herbert Kohl (D-WI) recently reintroduced legislation to expand disclosure of defined contribution plan fees. The Defined Contribution Plan Fee Disclosure Act was introduced in the previous Congress as S. 2473 but was never considered for a vote in committee or on the Senate floor.

Key elements of the bill include:

- Categories of fees to be disclosed are limited to (1) charges for investment management, (2) charges for recordkeeping and administration, (3) sale charges, including commissions, and charges for advisory services, and (4) other charges.
- It appears that the bill will allow charges to be provided in the form of a formula, such as a percent of assets or a dollar charge. However, a sentence following this language (which appears several places in the bill) requires "consistency throughout the disclosure." Depending on how this consistency requirement is interpreted, the latter sentence could take away the flexibility seemingly offered in the preceding language. The question is whether the disclosure has to provide every charge in a dollar figure if some charges are made in dollar figures or the disclosure must simply be consistent with respect to the same type of charge (for example, all investment management fees as expense ratios).
- Plan administrators are required to provide an annual notice of the investment options available for election under the plan at least 15 days prior to the participant's initial contribution and the effective date of any material change in investment options. The notice should include each option's investment objectives, risk level, comprehensiveness, management style (active or passive), comparison to nationally recognized market-based index or other investment option (identified by Secretary of Labor), availability of additional information, historical rate of return and fees and an explanatory statement about these criteria.
- The disclosure between service providers and plan fiduciaries is available upon the request of participants. The service provider disclosure to plan fiduciaries is only required if the total cost for services under the contract equals or exceeds the greater of

$5,000 or 0.01 percent of the value of plan assets as of the last day of the preceding plan year. The bill does not require the disclosure of "revenue sharing" payments between affiliates.

- The bill directs the U.S. Department of Labor (DOL) to allow any disclosures to be provided using electronic medium under rules similar to those applicable under the Internal Revenue Code (sometimes referred to as "the IRS's rules"). DOL is also directed to come up with model notices.
- Information to be included in the quarterly benefit statements is to include information on the historical return and risk of each investment option and the estimated amount that the participant needs to save each month to retire at age 65.

The legislation requires the Secretary of Labor to issue final regulations by December 31, 2010, and would apply to plan years beginning after December 31, 2011.

New Bill Would Curb CEO Pay for TARP Participant Companies

Senator Claire McCaskill (D-MO) has introduced the Cap Executive Officer Pay Act, legislation that would limit pay for executives whose companies participate in the Troubled Asset Relief Program (TARP). Under the bill, all executives (including officers and directors) of companies that received TARP funds could not be paid more than the U.S. president's annual salary ($400,000). Covered compensation under the bill would include not just salary but deferred compensation, retirement contributions, bonuses, stock options, property, and "any other form of compensation" that Treasury deems appropriate.

The proposal is a reaction to recent scrutiny over public reports of large bonuses paid to TARP participants. On January 30, the Government Accountability Office issued a report, Troubled Asset Relief Program: Status of Efforts to Address Transparency and Accountability Issues.

The U.S. Treasury Department has already issued guidance on executive compensation limitations for participants in the capital purchase program (CPP) under the troubled asset relief program (TARP), as provided by the Emergency Economic Stabilization Act of 2008 (EESA). Treasury has also provided initial executive compensation rules under EESA and issued Notice 2008-94 relating to tax code Sections 162(m)(5) and 280G(e).

RECENT REGULATORY ACTIVITY

IRS, DOL Release COBRA Subsidy Guidance

On February 26, the Internal Revenue Service (IRS) issued guidance in "question-and-answer" form on the COBRA premium subsidy enacted under the American Recovery and Reinvestment Act of 2009 (ARRA), as well as a revised version of the Form 941 (with instructions), the quarterly payroll tax return that employers will use to claim credit for the COBRA medical premiums they pay for their former employees. Groom Law Group and Miller and Chevalier have issued summaries of the new guidance.

The IRS has established its own site for COBRA subsidy guidance (http://www.irs.gov/newsroom/article/0,,id=204505,00.html), similar to the U.S. Department of Labor (DOL) Employee Benefits Security Administration (EBSA) dedicated Web site. The DOL/EBSA recently issued "frequently asked questions" guidance for employers and employees:

- COBRA Continuation Health Coverage FAQs for Employees
- COBRA Continuation Health Coverage FAQs for Employers

As we have previously reported, the ARRA (signed into law by President Obama on February 17) includes a temporary subsidy for COBRA coverage for individuals who have been involuntarily terminated from employment on or after September 1, 2008, through December 31, 2009. The COBRA subsidy for eligible workers is 65 percent of the premium for nine months. The employer would receive a credit for the subsidy against payroll taxes and employee wage withholdings. The final agreement also includes an income limitation for eligible individuals. The law offices of Miller and Chevalier, Chartered, Groom Law Group, Chartered, and Davis and Harman, LLP have provided summaries.

Treasury, IRS Issue Final Regulations on Automatic Contribution Arrangements

On February 23, the U.S. Treasury Department and the Internal Revenue Service (Treasury and the IRS) released final regulations relating to automatic contribution arrangements, The final regulations reflect statutory changes made in the Pension Protection Act of 2006 as well as the Worker, Retiree, and Employer Recovery Act of 2008 (WRERA).

The regulations generally define the rules for qualified automatic contribution arrangements (QACAs), intended to satisfy the nondiscrimination testing safe harbor of Internal Revenue Code section 401(k)(13), and Eligible Automatic Contribution Arrangements (EACAs), arrangements that allow permissive withdrawals under Code section 414(w).

Some of the key clarifications/simplifications reflected in the final regulations include:

- In order to meet the requirements for an EACA, it is no longer necessary for contributions to be invested in a Qualified Default Investment Alternative (as described in U.S. Department of Labor regulations). This change was included in the WRERA.
- Plans can require that affirmative elections expire and require employees to make new affirmative elections (some plan sponsors want to reenroll non-participating employees or enroll employees when there is inconclusive evidence of a prior "zero" election).
- The final regulations allow plans that wish to meet QACA requirements to increase contribution percentages during the middle of the year providing certain requirements are met (thereby allowing increases to coincide with compensation increases).
- The final regulations ease the proposed regulatory requirement that immediately eligible employees receive the notice no later than the hire date to allow the notice to be provided prior to the pay date for the payroll period that includes the date the employee becomes eligible.
- The final regulations allow the EACA to cover fewer than all employees (i.e., only those employees specified in plan). However, plans with EACAs do not benefit from the six-month extension for correcting excess contributions and excess aggregate contributions unless all eligible employees are covered under the EACA for the entire plan year.
- A plan is permitted to provide that matching contributions will not be made if permissive withdrawals have been made prior to the date on which matching contributions would otherwise be allocated (the proposed regulations had required forfeiture of matching contributions related to the permissive withdrawals).
- The final regulations do not affect any automatic contribution arrangement that is not intended to be a QACA or EACA (including pre-existing automatic contribution arrangements).
- A rehired participant who did not have contributions made under a QACA for a year can start over with respect to accelerated contributions (i.e., a new initial period begins after employee is rehired).

Other key provisions/modifications include:

- Regarding the scope of automatic enrollment programs, a QACA generally must automatically enroll all eligible employees who have not made an affirmative election to participate (or not to participate). The final regulations continue to provide that only employees that had an affirmative election in effect immediately before the QACA is effective may be excluded from the default election.

- Multiemployer and multiple employer plans can have separate EACAs for different groups of collectively bargained employees or employees of different employers in a multiple employer plan.

- The final regulations continue to require that EACAs be in place for an entire plan year (i.e., no mid-year EACA).

- If a plan does not reinstate affirmative election after a hardship withdrawal six-month suspension, the employer must automatically enroll the employee in the QACA.

The effective date of the regulations depends on the type of automatic contribution arrangement. For QACAs, the regulations are generally applicable to plan years that begin on or after January 1, 2008. For EACAs, the new rules are effective for plan years beginning on or after January 1, 2010. The preamble states that, for plan years that begin in 2008, an EACA must operate in accordance with a good faith interpretation of section 414(w), but the preamble is silent on the status of plan years that begin in 2009.

ERISA Advisory Council Releases Recommendations to DOL

The ERISA Advisory Council, a group of benefits experts established by the U.S. Department of Labor (DOL) to identify emerging benefits issues and advise the Secretary of Labor on health and retirement policy, has released its recommendations stemming from its 2008 working group topics.

Two of the ERISA Advisory Council's working group topics include: "Phased Retirement" and the "Spend Down Of Defined Contribution Assets At Retirement."

The report on Phased Retirement examines the issues facing employers who wish to create flexible work arrangements for retirees and near-retirees and the employees who wish to take advantage of them, as well as the various legal and regulatory obstacles to the implementation of such an arrangement. Recommendations include:

1. *Serve as a catalyst to remove legislative and regulatory impediments to phased retirement arrangements.* The DOL should initiate, facilitate and engage in efforts to assist the development of sound retirement security policy that addresses phased retirement programs. Despite the fact that substantially all of the major impediments to phased retirement that witnesses identified are not under its jurisdiction, the DOL is in a unique position to influence the Treasury Department to develop tax-related incentives for flexible retirement programs.

2. *Ensure that any phased retirement regulatory regime is reasonable.* Regulatory requirements applicable to a phased retirement program should strike a reasonable balance between protecting employees and not imposing unnecessary requirements on employers and plan sponsors.

3. *Develop expanded and updated educational materials.* DOL resources pertaining to phased retirement should be revised or created, such as a publication that provides assistance to employers and employees who are struggling to cope with the challenges of any phased retirement opportunities.

The report on "Spend Down Of Defined Contribution Assets At Retirement" (or "decumulation) addresses the role of DOL guidance or regulation in enhancing the retirement security of American workers by facilitating access to and utilization of income stream distributions from defined contribution plans. The report also examines ways to expand on the success of the Pension Protection Act of 2006 (PPA) automatic enrollment, contribution escalation and default investment practices by incorporating similar concepts into the distribution phase. Recommendations include:

1. *Simplify the proposed annuity provider selection rules and eliminate the requirement for an independent expert.* ERISA's "prudent expert" standard suggests that plan sponsors, whether or not complying with a safe harbor, are required to exercise the same prudence when selecting an annuity as is required to be exercised in the selection of any other investment.

2. *Update, expand, and amend DOL Interpretive Bulletin 96-1.* This DOL guidance should be expanded by adapting it to the spend-down phase. Plan sponsors need clear guidance about the type of information, programs and education they may provide to participants, without being concerned that they are acting as a fiduciary providing investment advice or that they may be exposed to liability for breach of their fiduciary duty.

3. *Clarify the qualified default investment alternatives (QDIAs) with respect to default options incorporating guarantees that extend into the distribution phase.* The DOL should clarify that eligible QDIAs will continue to so qualify as such when participants are in pay status if such investment products are retained in the plan.

4. *Encourage and allow additional participant disclosure, specifically the conversion of account balances into annual retirement income.* The DOL should encourage, authorize, endorse and facilitate plan communications that use retirement income replacement formulas based on final pay and other reasonable assumptions in employee benefit statements on an individual participant basis.

5. *Enhance plan sponsor and participant education regarding the flexibility for distribution options*. The DOL should publish and regularly update information which provides useful guidance, education and information to underscore the inherent flexibility (and associated risks) available to participants in defined contribution plans.

The third report, on "Hard To Value Assets And Target Date Funds," studied fiduciary issues surrounding the selection, monitoring, and valuation, as well as the accounting and reporting requirements for hard-to-value assets, and sought to address questions and concerns regarding the implementation of target-date funds as prudent retirement investments. Recommendations include:

1. *The DOL should issue guidance which addresses the complex nature and distinct characteristics of hard-to-value assets.* This guidance should define such assets and describe the ERISA obligations when selecting, valuing, accounting for, monitoring and disclosing/reporting these assets.

2. *The DOL should reinforce ERISA requirements relative to plan investments in target-date funds.*

3. *The DOL should develop participant education materials and illustrations to enhance awareness of the value and the risks associated with target-date funds.*

DOL Issues Defined Benefit Plan Model Funding Notice

The U.S. Department of Labor (DOL) Employee Benefits Security Administration (EBSA) issued Field Assistance Bulletin (FAB) 2009-1 providing long-awaited model notices for disclosure of defined benefit plan funding status. According to the Pension Protection Act of 2006 (PPA), single-employer and multiemployer defined benefit plan administrators are required to provide participants and others with information about the plan's funding percentage, a statement of the value of the plan's assets and liabilities, a description of how the plan's assets are invested as of specific dates, and a description of the benefits under the plan that are eligible to be guaranteed by the Pension Benefit Guaranty Corporation.

The single-employer model notice and the multiemployer model notice are available on several leading benefit sites including the DOL/EBSA newsroom page.

FAB 2009-1 also provides interim guidance under the program, announcing a "good faith" enforcement policy and providing technical assistance in the form of questions and answers. Calendar year plans only have until the end of April (120 days after the end of the plan year) to provide their first PPA funding notice.

DOL Extends Effective Date, Comment Period for Investment Advice Regulations

On February 2, the U.S. Department of Labor (DOL) Employee Benefits Security Administration ordered a 60-day delay in the effective date of final investment advice regulations, issued on January 16. These final regulations (which incorporate the class exemption) allows investment advice to be provided in two ways: (1) through the use of a computer model certified as unbiased, or (2) through an adviser compensated on a "level-fee" basis. In addition to an extended effective date, the comment period has also been reopened.

A White House memorandum allowed agency heads to consider a 60-day extension of the effective date (and a reopening of the comment period) for regulations that have been published but are not yet effective – such as the investment advice regulations.

There has been considerable Democratic opposition to elements of the final regulations and some Democrats have expressed interest in changing the underlying provisions of the Pension Protection Act (PPA) to prevent what they label as "conflicted" advice. It appears highly unlikely that the investment advice regulation will be retained in its current form.

Treasury Introduces Executive Compensation Restrictions for TARP Companies

The White House and U.S. Treasury Department recently announced a new set of guidelines on executive pay for financial institutions that are receiving government assistance through the Troubled Asset Relief Program (TARP).

For companies receiving "exceptional assistance" – i.e., bank-specific negotiated agreements with Treasury – The rules would require:

- That senior executives be limited to $500,000 in total annual compensation, other than restricted stock;
- Any additional pay for senior executives must be in restricted stock (or other similar long-term incentive arrangements) that vests when the government has been repaid with interest;
- Executive compensation structure and strategy must be fully disclosed and subject to a "say on pay" shareholder resolution, in which compensation structures must be submitted to a non-binding shareholder resolution;
- Payouts would be subject to clawback bonuses for top executives engaging in deceptive practices (i.e., knowingly engaged in providing inaccurate information relating to financial statements or performance metrics used to calculate their own incentive pay);
- Increased bans on golden parachutes for senior executives; and

- Board of directors' adoption of company policy relating to approval of luxury expenditures.

Similar but less stringent rules would be imposed on companies not receiving "exceptional" assistance but participating in the "generally available" capital access program.

The guidelines also include principles for long-term regulatory reform of executive compensation strategies, such as:

- Requiring all compensation committees of public financial institutions to review and disclose strategies for aligning compensation with sound risk-management;
- Designing executive compensation incentives that encourage a long-term perspective;
- Passing "say on pay" shareholder resolutions on executive compensation; and
- Initiating a White House -Treasury conference on long-term executive pay reform.

This proposal is another response to public reports of large bonuses paid to executives of financial institutions participating in TARP. Senator Claire McCaskill (D-MO) has introduced the Cap Executive Officer Pay Act, legislation that would limit pay for executives whose companies participate in TARP to no more than $400,000. In addition, the Government Accountability Office issued a report, Troubled Asset Relief Program: Status of Efforts to Address Transparency and Accountability Issues.

In the next Benefits Insider, we will detail the additional efforts afoot in Congress to address the taxation of excessive bonuses for TARP company employees.

RECENT JUDICIAL ACTIVITY

Circuit Court Finds for Plan Administrator in 401(k) Fee Case

On February 12, the U.S. Court of Appeals for the Seventh Circuit ruled for the defendant in the case of Hecker et al v. Deere & Company/Fidelity, affirming a district court decision that the plaintiffs (participants in the Deere & Company 401(k) plans) failed to state a claim against the defendants.

The class-action suit sought to address fee arrangements in 401(k) plans, generally targeting revenue sharing arrangements. The plaintiffs alleged fiduciary duty violations stemming from the defendants' selection of investment options with "excessive and unreasonable fees and costs," and failure to disclose to plan participants appropriate information regarding such fees and costs, including failure to disclose revenue sharing payments between the service providers. In June 2007, The U.S. District Court for the Western District of Wisconsin granted the defendants' motion to dismiss the case, ruling that company would be protected by the ERISA Section 404(c) safe harbor because the plan permitted the participants to choose among a broad array of investment options. The court went on to state that even if 404(c) did not apply, the breadth of the investment options available to participants, which was over 2500 funds, when taking into account the directed brokerage window, made "untenable" the plaintiffs' claims that every investment option was "burdened with excessive expenses."