

Publications

New DOL Advisory Opinion Guidance Outlines Approach for Diverse Plan Investment Manager Hiring Program

ATTORNEYS & PROFESSIONALS

Michael Del Conte

mdelconte@groom.com

202-861-6657

David Levine

dlevine@groom.com

202-861-5436

Thomas Roberts

troberts@groom.com

202-861-6616

George Sepsakos

gsepsakos@groom.com

202-861-0182

Malcolm Slee

mslee@groom.com

202-861-6337

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In a [September 29, 2023 Advisory Opinion](#) issued to Citigroup Inc. (“Citi”), the Department of Labor (“DOL”) addressed several key ERISA implications arising in connection with a Citi Racial Equity Program (the “Program”). The Program involves, as here relevant, a commitment by Citi, as plan sponsor, to pay all or some portion of the investment management fees for diverse managers retained by Citi-sponsored defined benefit and defined contribution retirement plans and welfare benefit plans that hold investment assets.

The decision to hire a manager, whose fees are offset under the Program, would be made by the plan’s “Investment Committee” which acts as the named fiduciary for each plan. The Investment Committee would apply a set of pre-determined criteria – including candidates’ credentials, assets under management, years in business, asset class experience, and other general factors – for purposes of identifying manager candidates to be interviewed by the Investment Committee as part of a process for awarding plan investment management mandates. Citi’s plan sponsor commitment to pay all or a portion of applicable investment management fees for some of these manager candidates that are “diverse managers” would be factored into the Investment Committee’s evaluation process when considering performance and cost factors.

The Advisory Opinion provides that an investment manager would be expected to qualify as a diverse manager for purposes of the Program if it has a total minority/female ownership equal to or greater than a specified percentage, such as 50 percent. Determinations as to whether any investment manager satisfies those criteria percentages would be made using a data base maintained by an independent third party over which the plan sponsor exerts no influence or control.

DOL addresses the following three specific ERISA issues in the new advisory opinion:

1. Program Establishment and Fee Obligation a Settlor Function.

DOL indicates it would not view Citi as a fiduciary with respect to the selection of investment managers under the plans solely by reason of establishing the Program or by paying or reimbursing the plans for diverse managers’ fees pursuant to Program

commitments and in accordance with plan documents. Note, however, that Citi would remain responsible as a fiduciary for selecting and monitoring Investment Committee members and the Investment Committee would function as a fiduciary when engaged in the process of implementing the Program.

2. Investment Committee Members May Take Citi Fee Commitment into Consideration.

DOL expresses the view that Investment Committee members' consideration of the Program and Citi's related fee commitments would be an appropriate and relevant factor for inclusion in the fiduciary consideration process. Importantly, DOL notes that it would not view the Investment Committee members' best judgment as fiduciaries as being influenced merely because they were aware of the Program's potential for generating reputational benefits to Citi. That observation is balanced by a cautionary note that it would be inconsistent with ERISA's fiduciary standards if Investment Committee members were to exercise their fiduciary authority for the purpose of advancing Citi's corporate public policy goals. Ultimately, DOL notes that determinations of whether Investment Committee members satisfy their fiduciary duties would involve a facts and circumstances-based determination.

3. Information about the Program May be Included in Participant Disclosure Materials.

DOL indicates that describing the Program in relevant participant disclosure materials would not, in and of itself, involve an exercise of improper influence or control over participant investment decision making that would render the fiduciary protections under ERISA section 404(c) unavailable. DOL similarly indicates that while the expense ratio for a 401(k) plan's diverse equity managed investment option would need to reflect the manager's fees, it would also be permissible to include an explanation of Citi's commitment to absorb all or a portion of the cost of that expense in participant disclosure materials.

The implications of this new piece of DOL guidance are potentially far reaching. The guidance may be controversial, as it touches on issues similar to those addressed in the DOL's recent ESG rulemaking initiatives.

We are still engaged in analyzing the advisory opinion and potential applications of the new DOL guidance. Please reach out to your regular Groom contact with any questions.