S. 401

To amend the Employee Retirement Income Security Act of 1974 to provide special reporting and disclosure rules for individual account plans, and for other purposes.

IN THE SENATE OF THE UNITED STATES

FEBRUARY 9, 2009

Mr. HARKIN (for himself and Mr. KOHL) introduced the following bill; which was read twice and referred to the Committee on Health, Education, Labor, and Pensions

A BILL

To amend the Employee Retirement Income Security Act of 1974 to provide special reporting and disclosure rules for individual account plans, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the “Defined Contribution Fee Disclosure Act of 2009”.
SEC. 2. SPECIAL REPORTING AND DISCLOSURE RULES FOR INDIVIDUAL ACCOUNT PLANS.

(a) In General.—Part 1 of subtitle B of title I of the Employee Retirement Income Security Act of 1974 is amended—

(1) by redesignating section 111 (29 U.S.C. 1031) as section 113; and

(2) by inserting after section 110 (29 U.S.C. 1030) the following new sections:

“DISCLOSURE TO EMPLOYERS SPONSORING DEFINED CONTRIBUTION PLANS

“Sec. 111. (a) Service Disclosure Statement.—The plan administrator of an individual account plan which includes a qualified cash or deferred arrangement (or any other plan official with contracting authority under the terms of the plan) may not enter into any contract with any person for services to the plan unless such plan administrator or other official has received, reasonably in advance of entering into the contract, a written statement from such person which—

“(1) describes the services for the plan that will be provided under the contract and identifies any other entity that will be performing such services under the contract (including any other affiliated or third party service providers) pursuant to a direct contract with the plan administrator (or any other
plan official with contracting authority under the plan), and

“(2) provides the expected total annual charges for the services for the plan that will be provided under the contract including a reasonable allocation of such total annual charges among all relevant component charges.

For purposes of paragraph (2), the expected total annual charges and each component charge may be provided in the form of a dollar amount or in the form of a formula, such as a percent of assets or a dollar charge. The form of the such charges shall be consistent throughout the statement.

“(b) Minimum Allocation Requirements.—

“(1) In general.—The allocation required under subsection (a)(2) shall, pursuant to rules prescribed by the Secretary, provide the following component charges (to the extent such services for the plan are provided under the contract):

“(A) Charges for investment management.

“(B) Charges for recordkeeping and administration.

“(C) Sales charges, including commissions, and charges for advisory services.
“(D) Any other charges not described in
subparagraphs (A), (B), and (C).

“(2) Estimations.—To the extent the actual
charges or percentages required to be disclosed
under subsection (a)(2) are not known, the service
provider may provide a reasonable and representa-
tive estimate and shall indicate any such estimate as
being such an estimate. If any estimate of a material
charge provided under such subsection is subse-
quently determined to be materially incorrect, the
service provider shall provide the correct amount in
an amended report as soon as is reasonable after
such correct amount is known. Such amended report
or, in the case of a plan year in which no estimate
of a material charge has been determined to be ma-
terially incorrect, a report setting forth such fact,
shall be provided not less often than annually.

“(3) Definitions.—The Secretary shall pro-
vide by regulation definitions of the terms used in
this subsection.

“(c) Disclosure of Financial Relationships.—
“(1) In general.—The statement required
under subsection (a) shall include a written disclo-
sure of—
“(A) any payments which the service provider receives from an unaffiliated person other than the plan or plan sponsor in connection with the provision of services to the plan, including any payments received for including certain investment options as part of a menu of investment options,

“(B) any financial or personal relationship with the plan sponsor, the plan, or another person providing services to the plan, if such relationship results in the service provider deriving any material benefit in addition to those already identified in the contract in connection with its services to the plan, and

“(C) such other similar arrangements benefiting the service provider as may be specified by the Secretary.

“(2) INCLUSIONS.—Disclosures described under paragraph (1)(B) shall include the extent to which the service provider uses its own proprietary investment products. Disclosures under this subsection may include a description of any applicable prohibited transaction exemption under section 408. Nothing in this subsection affects the operation of section 406 or 408.
“(d) Disclosure of Impact of Share Classes.—

The statement required under subsection (a) shall, to the extent applicable, disclose that the share prices of certain mutual fund investments may be different from the share price outside of the plan due to the existence of different share classes and the basis for these differences.

“(e) Disclosure of Certain Arrangements in Connection With Free or Discounted Services or Rebates by Service Providers.—

“(1) In general.—In any case in which services are provided to the plan, or to the plan sponsor in connection with the plan, by any service provider without charge or for fees set at a discounted rate or subject to rebate, the statement required under subsection (a) shall include a description of the extent to which, and the amount by which, consideration is otherwise obtained by the service provider, the plan, or the plan sponsor for such services, directly or indirectly, by means of any charges against the account of the participant or beneficiary.

“(2) Exception.—The Secretary may provide an exception to the requirement under paragraph (1) for small plans, if such requirements are determined by the Secretary to be overly burdensome on such plans.
“(f) MODEL STATEMENT.—The Secretary shall pre-
scribe a model statement that may be used for purposes
of satisfying the requirements of this section.

“(g) FORM AND MANNER.—Any statement required
under this section—

“(1) shall be provided in a form and manner
prescribed in regulations of the Secretary,

“(2) shall be written in a manner so as to be
understood by the average plan participant, and

“(3) may be provided in written, electronic, or
other appropriate form to the extent such form is
reasonably accessible to persons to whom the notice
is required to be provided.

“(h) UPDATING.—Each contract with a service pro-
vider entered into as described in subsection (a) shall re-
quire that the service provider provide to the plan adminis-
trator, during the term of the contract, an updated written
statement described in subsection (a)—

“(1) at least annually, and

“(2) as soon as practicable after any material
change in the information provided in the statement.

“(i) AVAILABILITY TO PARTICIPANTS.—The plan
sponsor or plan administrator shall provide to participants
and beneficiaries a copy of any statement received pursu-
ant to this section within 30 days after receipt of a written request for such statement.

“(j) LIMITATION.—The requirements of this section shall apply with respect to any contract for services only if the total cost for such services under such contract equals or exceeds the greater of—

“(1) $5,000 per plan year, or
“(2) 0.01 percent of the value of plan assets as of the last day of the preceding plan year.

“(k) QUALIFIED CASH OR DEFERRED ARRANGE-
MENT.—For purposes of this section, the term ‘qualified cash or deferred arrangement’ includes—

“(1) an arrangement described in section 401(k)(2) of the Internal Revenue Code of 1986, and
“(2) an annuity contract described in section 403(b) of such Code that is subject to this Act.

“(l) REGULATIONS REGARDING CERTAIN PROD-
UCTS.—The Secretary shall prescribe regulations identifying any investment alternatives that may not have specific fees associated with the investment, including investment alternatives that provide a guaranteed rate of return.

“(m) PLAN ASSETS.—This section shall not apply to any contract under which payment for services is made in a manner that does not involve assets of the plan.
INVESTMENT ELECTION INFORMATION

Sec. 112. (a) Advance Notice of Available Investment Options.—The plan administrator of an individual account plan which permits a participant or beneficiary to exercise control over the assets in the account of the participant or beneficiary shall provide to the participant or beneficiary, with respect to each plan year, notice of the investment options available for election under the plan at least 15 days prior to—

“(1) the participant’s initial investment of any contribution made on behalf of such participant, and

“(2) the effective date of any material change in investment options.

In the case of an automatic contribution arrangement (as defined in subparagraphs (A) and (B) of section 514(e)(2)), the notice required under paragraph (1) may be provided within any reasonable period prior to such initial investment. With respect to the notice required under paragraph (2), the Secretary shall prescribe regulations creating exceptions to the 15-day notice requirement in circumstances similar to those described in section 101(i)(2)(C).

“(b) Information Included in Notice.—The notice required under subsection (a) shall—
“(1) set forth, with respect to each available investment option—

“(A) the name of the option,

“(B) the investment objectives of the option,

“(C) the risk level associated with the option,

“(D) whether the option is a comprehensive investment designed to achieve long-term retirement security or should be combined with other options,

“(E) whether the investment option is actively or passively managed,

“(F) a comparison to a nationally recognized market-based index or other investment option that is recommended in the retirement industry as a benchmark investment option, as identified by the Secretary,

“(G) where, and the manner in which, additional plan- and option-specific and generally available investment information regarding the option may be obtained,

“(H) the historical return and percentage fee assessed against amounts invested under the option, and
“(I) include, together with any form necessary for making the election of investment options, a statement explaining that investment options should be selected not only on the basis of the level of fees charged by each option but also on the basis of careful consideration of other key factors, including the risk level of the option and historical returns by the option, and
“(2) include an investment comparison chart, relating to all investment options available under the plan, as provided in subsection (c).
“(c) INVESTMENT COMPARISON CHART.—
“(1) IN GENERAL.—
“(A) CHART REQUIREMENTS.—The notice provided under this section shall include an investment comparison chart consisting of a comparison chart of the potential service fees that could be assessed against the account of the participant or beneficiary with respect to the plan year. The investment comparison chart shall be presented in a manner which is easily understood by the average participant and include such information as the Secretary determines necessary to permit participants and beneficiaries to assess the potential services
that could be provided in connection with the investment options and the potential fees that could be assessed against their accounts for such services.

“(B) FORM.—For purposes of this subsection, the potential service fees may be provided in the form of a dollar amount or in the form of a formula, such as a percent of assets or a dollar charge for each instance that a participant or beneficiary enters into a specified transaction. The form of the potential service fees shall be consistent throughout the notice.

“(2) CATEGORIZATION OF FEES.—The investment comparison chart shall provide information in relation to 4 categories of fees paid by the participant or beneficiary, as follows:

“(A) Fees that vary depending on the investment options selected by the participant or beneficiary, including expense ratios and investment-specific asset-based fees.

“(B) Fees that are assessed as a percentage of the total assets in the account of the participant or beneficiary, regardless of the investment option selected. Such category shall include a statement noting fees and expenses of
1 or more investment alternatives which pay for services other than investment management and a statement explaining that investment options should be selected not only on the basis of the level of fees charged by each option but also on the basis of careful consideration of other key factors, including the risk level of the option and historical returns by the option.

“(C) Administration and transaction-based fees, including plan loan origination fees, possible redemption fees, and possible surrender charges, that are either automatically deducted each year or result from certain transactions engaged in by the participant or beneficiary.

“(D) Fees and expenses which may be deducted from participants’ or beneficiaries’ accounts and which are not reflected in subparagraphs (A), (B), and (C).

“(d) ESTIMATIONS.—To the extent the actual charges or percentages required to be disclosed under subsection (b) or (c) are not known, the plan administrator may provide a reasonable and representative estimate and shall indicate any such estimate as being such an estimate.

If any estimate of material information provided under this subsection is subsequently determined to be materially
incorrect, the plan administrator shall provide the correct
amount in an amended report as soon as is reasonable
after such correct amount is known.

“(e) MODEL NOTICE.—The Secretary shall prescribe
a model notice that may be used for purposes of satisfying
the requirements of this section, including a model invest-
ment comparison chart.

“(f) FORM AND MANNER.—Any notice required
under this section—

“(1) shall be provided in a form and manner
prescribed in regulations of the Secretary,

“(2) shall be written in a manner so as to be
understood by the average plan participant, and

“(3) may be provided in written, electronic, or
other appropriate form to the extent such form is
reasonably accessible to persons to whom the notice
is required to be provided.

“(g) REGULATIONS REGARDING CERTAIN PROD-
UCTS.—The Secretary shall prescribe regulations identi-
fying any investment alternatives that may not have spe-
cific fees associated with them, including investment alter-
atives that provide a guaranteed rate of return. In addi-
tion, the Secretary shall prescribe regulations providing
for distinct reporting of investment alternatives that—
“(1) are difficult to value with reasonable cer-
tainty on an annual basis, or
“(2) do not have generally accepted benchmarks
for comparison purposes.”.

(b) QUARTERLY BENEFIT STATEMENTS.—Section
105 of the Employee Retirement Income Security Act of
1974 (29 U.S.C. 1025) is amended—

(1) in subsection (a)(2)—

(A) by redesignating subparagraph (C) as

subparagraph (D); and

(B) in subparagraph (B)(ii)—

(i) in subclause (II), by striking “di-

versified, and” and inserting “diversified,”;

(ii) in subclause (III), by striking the

period and inserting “, and”; and

(iii) by adding at the end the fol-

lowing:

“(IV) with respect to the portion of a

participant’s account for which the partici-

pant has the right to direct the investment

of assets—

“(aa) the starting balance of the

participant’s account,

“(bb) the participant’s vesting

status,
“(ee) contributions made during
the quarter, itemizing separately to-
tals for employer and totals for em-
ployee contributions,

“(dd) interest earnings on the ac-
count balance during the quarter,

“(ee) actual or estimated fees as-
scribed from the account during the
quarter, expressed in dollars or as an
expense ratio,

“(ff) the ending balance of the
account,

“(gg) the participant’s asset allo-
cation, categorized by investment op-
tion, including the current asset value,
the changes in the asset value during
the quarter, and the net return for
the quarter, expressed as an amount
and as a percentage, and

“(hh) the performance of the in-
vestment options selected by the par-
ticipant during the quarter as com-
pared to at least 1 nationally recog-
nized market-based index, as identi-
fied by the Secretary.
“(C) ADDITIONAL REQUIREMENTS.—With respect to a pension benefit plan described under paragraph (1)(A)(i), the following shall apply:

“(i) INFORMATION TO BE AVAILABLE UPON REQUEST.—At the request of the participant or beneficiary, the plan administrator shall, not later than 30 days after the receipt of such request, provide information on the service fees charged against the participant’s account for the quarter for each investment option, indicating separately—

“(I) fees that vary depending on the investment options selected by the participant or beneficiary, including expense ratios, investment-specific asset-based fees, possible redemption fees, wrap fees, and possible surrender charges,

“(II) fees that are assessed as a percentage of the total assets in the account of the participant or beneficiary, regardless of the investment option selected,

“(III) administration and transaction-based fees, including plan loan origination fees, that are either automatically deducted each year or result from certain trans-
actions engaged in by the participant or beneficiary, and

“(IV) fees and expenses that may be deducted from participants’ or beneficiaries’ accounts that are not reflected in subclauses (I), (II), and (III).

For purposes of this clause, the service fees may be provided in the form of a dollar amount or in the form of a formula, such as a percent of assets or a dollar charge for each instance that a plan participant or beneficiary enters into a specified transaction. The form of the service fees shall be consistent throughout the statement.

“(ii) OTHER INFORMATION.—The plan administrator shall include in such quarterly pension benefit statement information relating to 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.

“(iii) ESTIMATIONS.—To the extent that the actual charges or percentages required to be disclosed under this subparagraph are not known, the plan administrator may provide a
reasonable and representative estimate and
shall indicate any such estimate as being such
an estimate. If any estimate of material infor-
mation provided under this subparagraph is
subsequently determined to be materially incor-
rect, the plan administrator shall provide the
correct amount in an amended statement as
soon as is reasonable after such correct amount
is known.

“(iv) MODEL STATEMENT.—The Secretary
shall prescribe a model quarterly pension ben-
efit statement that may be used for purposes of
satisfying the requirements of this subpara-
graph or subparagraph (B)(ii).

“(v) EXCEPTION FOR SMALL EMPLOY-
ERS.—Any plan described in paragraph
(1)(A)(i) that has fewer than 100 participants
and beneficiaries may provide the pension ben-
efit statement under such paragraph on an an-
nual rather than a quarterly basis’’; and

(2) by adding at the end the following new sub-
sections:

“(d) ASSISTANCE TO SMALL EMPLOYERS.—The Sec-
retary shall make available to small employers—
“(1) educational and compliance materials designed to assist such employers in selecting and monitoring service providers for individual account plans, investment options under such plans, and fees relating to such options, without any bias as to the size of the service provider and the way any particular service provider delivers plan services, and

“(2) services designed to assist small employers in finding and understanding affordable investment options for such plans.

“(e) Assistance to Plan Sponsors and Plan Participants and Beneficiaries.—The Secretary shall provide assistance to plan sponsors of individual account plans and participants and beneficiaries under such plans with any questions or problems regarding compliance with the requirements of this section.

“(f) Form and Manner.—Any statement required under this section—

“(1) shall be provided in a form and manner prescribed in regulations of the Secretary,

“(2) shall be written in a manner so as to be understood by the average plan participant, and

“(3) may be provided in written, electronic, or other appropriate form to the extent such form is
reasonably accessible to persons to whom the notice
is required to be provided.

“(g) Regulations Regarding Certain Products.—The Secretary shall prescribe regulations identifying any investment alternatives that may not have fees associated with them, including investment alternatives that provide a guaranteed rate of return. In addition, the Secretary shall prescribe regulations providing for distinct reporting of investment alternatives that—

“(1) are difficult to value with reasonable certainty on an annual basis, or

“(2) do not have generally accepted benchmarks for comparison purposes.”.

(e) Enforcement.—Section 502(c)(7) of such Act (29 U.S.C. 1132(c)(7)) is amended by striking “section 101.” and inserting “section 101, or to provide a statement to participants and beneficiaries or to plan administrators in accordance with section 105(a)(2)(B)(ii), 111, or 112.”

(d) Conforming Amendment.—The table of contents in section 1 of such Act, as amended by section 2, is amended by striking the item relating to section 111 and inserting the following new items:

“Sec. 111. Disclosure to employers sponsoring defined contribution plans.
“Sec. 112. Investment election information.
“Sec. 113. Repeal and effective date.”.

(e) Effective Date.—
(1) Final Regulations.—The Secretary of Labor shall issue final regulations to carry out the amendments made by this section not later than December 31, 2010.

(2) Application of Provisions.—The amendments made by this section shall apply to plan years beginning after December 31, 2011.

SEC. 3. Annual Publication of Survey Data.


(1) by redesignating section 113 as section 114;

and

(2) by inserting after section 112 the following new section:

"Annual Publication of Survey Data

"Sec. 113. On an annual basis, the Secretary shall survey and publish, on the Internet website of the Department of Labor, data on plan investment options and median fee levels of index, lifecycle investment options, balanced investment options, and other investment options as the Secretary deems relevant."

(b) Conforming Amendment.—The table of contents in section 1 of such Act is amended by striking the
item relating to section 113 and inserting the following new items:

“Sec. 113. Investment election information.
“Sec. 114. Repeal and effective date.”.

SEC. 4. ENFORCEMENT COORDINATION AND REVIEW BY THE DEPARTMENT OF LABOR.

(a) IN GENERAL.—Section 502 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. 1132) is amended by adding at the end the following new subsection:

“(n) Enforcement Coordination of Certain Disclosure Requirements and Review by the Department of Labor.—

“(1) In General.—

“(A) Notification and Action.—The Secretary shall notify the applicable regulatory authority (including, as determined appropriate by the Secretary, the Securities and Exchange Commission or the Comptroller of the Currency) in any case in which the Secretary determines that a service provider is engaged in a pattern or practice that precludes compliance by plan administrators with section 111 or 112. The Secretary shall, in consultation with the applicable authority, take such timely enforcement action under this title as is necessary to
assure that such pattern or practice ceases and
desists and assess any appropriate penalties.

“(B) DISSEMINATION.—The Secretary
shall widely disseminate to employee pension
benefit plans covered by this title and their par-
ticipants and beneficiaries the identity of any
service providers with respect to such plans
found to be engaged in any pattern or practice
that precludes compliance by plan administra-
tors with section 111 or 112 and the particulars
of such pattern or practice. Prior to the dis-
semination of the identity of any service pro-
viders identified and determined by the Sec-
retary to be engaged in such a pattern or prac-
tice, such service provider shall receive a notice
of intent to disseminate, an opportunity to re-
quest an administrative hearing, and a timely
appeal to the Secretary.

“(C) REGULATIONS.—The Secretary shall
issue regulations for the administration and en-
forcement of this subsection.

“(2) ANNUAL AUDIT OF REPRESENTATIVE SAM-
PLING OF INDIVIDUAL ACCOUNT PLANS.—The Sec-
retary shall annually audit a representative sampling
of individual account plans covered by this title to
determine compliance with the requirements of sections 111 and 112. The Secretary shall annually report the results of such audit and any related recommendations of the Secretary to the Committee on Education and Labor of the House of Representatives and the Committee on Health, Education, Labor, and Pensions of the Senate.”.

(b) Review and Report to the Congress by the Secretary of Labor Relating to Reporting and Disclosure Requirements.—

(1) Study.—As soon as practicable after the date of the enactment of this Act, the Secretary of Labor (referred to in this subsection as the “Secretary”) shall review the reporting and disclosure requirements of part 1 of subtitle B of this title and related provisions of the Pension Protection Act of 2006.

(2) Report.—Not later than 18 months after the date of the enactment of this Act, the Secretary shall make such recommendations as the Secretary considers appropriate to the appropriate committees of the Congress to consolidate, simplify, standardize, and improve the applicable reporting and disclosure requirements so as to simplify reporting for employee pension benefit plans and ensure that needed
understandable information is provided to participants and beneficiaries of such plans.