



Employee Benefits Update

October 2023

DOL Greenlights Citibank's Diverse Asset Manager Program

On September 29, 2023, the Department of Labor (DOL) issued [Advisory Opinion 2023-01A](#) (Opinion) approving Citibank's Diverse Asset Manager Program (Program) as it relates to plans subject to the Employee Retirement Income Security Act of 1974 (ERISA). The Opinion provides a road map primarily for pension and 401(k) plan sponsors who wish to increase the portion of plan assets that are invested with diverse investment managers without running afoul of ERISA's rules.

Under the Program, which is part of Citibank's larger Action for Racial Equity designed to address the "racial wealth gap" affecting the business environment in which Citibank operates, Citibank commits to pay all or part of the fees of diverse asset managers for the ERISA plans it sponsors. In this groundbreaking Opinion, the DOL concluded that (1) Citibank's establishment of the Program and payment of investment management fees under the Program are settlor, not fiduciary, actions; (2) plan fiduciaries do not violate their fiduciary duties by taking into account Citibank's commitment to payment of fees under the Program; and (3) for Citibank's defined contribution plans, the Program does not constitute improper influence by a plan fiduciary or sponsor for the purpose of preventing participant control under ERISA section 404(c). The Opinion prescribes certain safeguards with respect to the Program to assure that Citibank's actions are considered settlor actions and that an Investment Committee's fiduciary decisions are not subject to a conflict of interest.

While the legal complexities around corporate supplier diversity, equity and inclusion (DEI) initiatives have recently grown, so too has the business rationale and need for such

programs for many companies. For those companies, creative approaches to achieving DEI objectives while mitigating legal risks are valuable. Plan sponsors may therefore want to work with ERISA counsel to determine how to use the Opinion as a guide in considering similar programs.

The Program

The details of the Program are described more fully in the Opinion, but at a high level, the Program is structured as follows:

Fee Subsidy. Citibank allocates a pre-determined amount of diverse manager fee subsidies to each ERISA plan it sponsors, subject to certain caps on total fees paid under the Program as well as to an individual manager and agrees to pay for or subsidize a diverse manager's fees for a minimum of three years.

- An investment manager will qualify as a diverse manager for purposes of the Program if it has a total minority or female ownership of at least a specific percentage set forth in the Program, such as 50%, as determined by a Nasdaq-affiliated database, or another database unaffiliated with Citibank.
- No investment manager who is a party in interest or in which Citibank has an interest would be eligible under the Program.

Manager Selection Process. In selecting investment managers, Citibank expects that the plan fiduciary (the Investment Committee for a plan) will perform an initial search of managers based on pre-determined criteria (such as the manager's credentials, AUM, experience) and then

narrow down the candidates based on additional factors, such as proposed fees. During the narrowing process, Citibank's commitment under the Program to pay all or a portion of a diverse manager's fees could be considered.

- The fiduciary's selection of managers is in its full and complete discretion. The Program will not provide Citibank with any rights regarding investment manager selections or allocations and will not mandate that a plan fiduciary engage in any particular search or selection processes.

Fee Disclosure. In disclosing the fees of an investment manager that manages a private fund offered to participants of one of Citibank's defined contribution plans, Citibank expects that the plan fiduciary will disclose the fund's expense ratio without regard to Citibank's payment of fees under the Program. However, Citibank's payment of fees under the Program also will be disclosed to participants.

The Program will be publicized as part of Citibank's reporting of its Action for Racial Equity initiatives but is not designed to produce a monetary or other tangible financial benefit to Citibank.

The DOL's Opinion

In the Opinion, the DOL reached three conclusions in respect of the Program:

1. **Citibank's Actions Are Settlor.** In establishing the Program and paying any diverse manager fees under the Program, Citibank is acting as a settlor, not a fiduciary, under ERISA.
2. **A Fiduciary May Consider Subsidized Fees.** Citibank's payment of fees under the Program is a financial factor that may be considered, as one of many factors, by a prudent fiduciary in selecting an investment manager.
3. **ERISA Section 404(c) Is Still Available.** ERISA section 404(c) limits liability of a plan fiduciary for investment losses where a participant or beneficiary exercises control over the assets in their individual account. However, DOL regulations provide that a participant or beneficiary is not considered to exercise control over their account where they are subject to "improper influence" by a plan fiduciary or sponsor. The DOL concluded that disclosure of the Program or payment

of fees under the Program would not constitute improper influence for the purpose of ERISA section 404(c).

Implications of Opinion

The Opinion provides an alternate pathway to reflect diversity factors in the context of selecting investment managers under ERISA plans generally. Prior to the Opinion, the principal pathway was consideration of those factors by the applicable plan fiduciary in its discretion as relevant to the risk and return analysis subject to ERISA's fiduciary duty rules. With this Opinion, an alternative pathway is now available for a plan sponsor to design its plan in a manner intended to further its corporate DEI initiatives without subjecting that design choice to ERISA's fiduciary duty rules.

Thompson Hine represented Citibank in obtaining this innovative Advisory Opinion, however this advisory bulletin is solely issued by Thompson Hine LLP.

FOR MORE INFORMATION

For more information, please contact:

Dominic DeMatties

202.973.2744

Dominic.DeMatties@ThompsonHine.com

Brian L. Gaj

216.566.5931

Brian.Gaj@ThompsonHine.com

or any other member of our [Employee Benefits & Executive Compensation](#) group.

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