



Report to the Ranking Member,
Committee on Education and the
Workforce, House of Representatives

June 2023

403(b) RETIREMENT PLANS

Department of Labor
Should Update
Educational Materials
to Better Inform Plan
Sponsors and
Participants

Accessible Version

Highlights of [GAO-23-105620](#), a report to the Ranking Member, Committee on Education and the Workforce, House of Representatives

Why GAO Did This Study

Like 401(k) plans, 403(b) plans are account-based defined contribution plans sponsored by employers. Many 403(b) plans are subject to ERISA requirements and are intended to protect the interests of plan participants. However, some 403(b) plans are not covered by ERISA.

GAO was asked to review (1) the extent of federal agencies' 403(b) plan oversight, (2) actions by selected states that could improve 403(b) participant outcomes, and (3) options stakeholders and experts have identified that could improve outcomes for 403(b) participants.

GAO analyzed DOL, SEC, and IRS data and documentation; reviewed documentation from five selected states identified as taking actions to improve participant outcomes; interviewed federal and state agency officials and experts; and conducted and analyzed results from surveys of plan sponsors and service providers about options to improve participant outcomes. The analysis of state actions and survey results offer a range of perspectives on improving participant outcomes but are not generalizable.

What GAO Recommends

GAO recommends that DOL update educational materials to contain information relevant to 403(b) plans, including information that could help participants understand plan fees. In commenting on the report, DOL neither agreed nor disagreed with our recommendation. DOL stated that it would review its relevant publications to see if they should more specifically reference 403(b) plans.

View [GAO-23-105620](#). For more information, contact Tranchau (Kris) T. Nguyen at (202) 512-7215 or nguyentt@gao.gov.

403(b) RETIREMENT PLANS

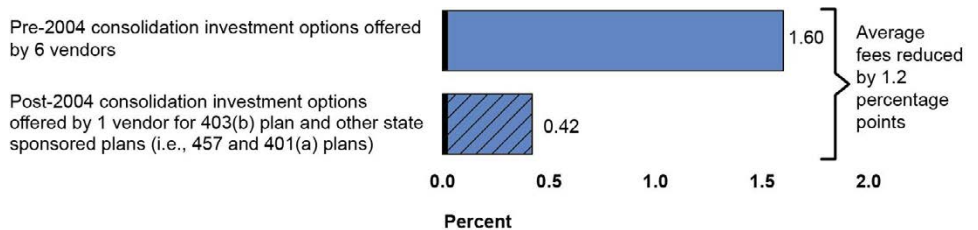
Department of Labor Should Update Educational Materials to Better Inform Plan Sponsors and Participants

What GAO Found

Millions of teachers and employees of tax-exempt organizations invest in 403(b) retirement plans. The Department of Labor (DOL), Securities and Exchange Commission (SEC), and Internal Revenue Service (IRS) take steps to oversee some 403(b) plans or their investment options, or both. Specifically, DOL oversees 403(b) plans subject to the Employee Retirement Income Security Act of 1974, as amended (ERISA), and uses a range of strategies to identify plans to investigate for compliance with the law. For example, DOL has investigated instances of self-dealing—when a plan fiduciary uses plan assets for the fiduciary's own interest or own account. The SEC's oversight focuses on compliance with securities laws and regulations, while the IRS's oversight focuses on compliance with the Internal Revenue Code. DOL, SEC, and IRS also conduct outreach and provide educational materials to 403(b) plan sponsors and participants. However, DOL's website does not contain targeted educational materials that could help participants understand 403(b) plan fees. Updated DOL information on 403(b) plans could help participants make more informed decisions.

GAO reviewed how five selected states worked to improve outcomes—including in some cases reducing fees participants pay—in 403(b) plans that are not subject to ERISA requirements. Officials in three of the states said they had consolidated the number of service providers offering investment options, which strengthened oversight by reducing the number of service providers they had to oversee. Officials in Connecticut told GAO consolidating service providers also resulted in lower annual fees for participants (see figure). Officials in four of the selected states said they enhanced transparency by providing participants with additional information on plans' investment options and fees or by making it available elsewhere.

Connecticut: Average Investment Fees Pre- and Post-2004 Consolidation



Source: GAO analysis of state provided documentation and interviews with state officials. | GAO-23-105620

Accessible Data for Connecticut: Average Investment Fees Pre- and Post-2004 Consolidation

- Pre-2004 consolidation investment options offered by 6 vendors, 1.60%
- Post-2004 consolidation investment options offered by 1 vendor for 403(b) plan and other state sponsored plans (i.e., 457 and 401(a) plans), 0.42
- Average fees reduced by 1.2 percentage points

Stakeholders and experts identified actions they said could improve 403(b) participant outcomes. For example, they suggested establishing fiduciary duties for non-ERISA plans in some states that are not subject to such protections can help protect participants' interests. Also, they said requiring distribution of standardized information on investment options' returns and fees for participants in non-ERISA plans would promote transparency. Multiple experts also suggested that allowing 403(b) plans to use certain other investment vehicles could reduce fees.

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Abbreviations

CalSTRS	California State Teachers Retirement System
CIT	collective investment trust
DOL	Department of Labor
EBSA	Employee Benefits Security Administration
ERISA	Employee Retirement Income Security Act of 1974, as amended
FINRA	Financial Industry Regulatory Authority, Inc.
IRA	Individual Retirement Account
IRC	Internal Revenue Code
IRS	Internal Revenue Service
KBOR	Kansas Board of Regents
NAIC	National Association of Insurance Commissioners
NTSA	National Tax-Deferred Savings Association
Safe harbor	Limited Employer Involvement safe harbor
SEC	Securities and Exchange Commission
SFRO	San Francisco Regional Office

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June 21, 2023

The Honorable Robert C. “Bobby” Scott
Ranking Member
Committee on Education and the Workforce
House of Representatives

Dear Mr. Scott:

Millions of teachers and employees of tax-exempt organizations save for retirement through 403(b) plans. The regulation and oversight of these plans vary based on the extent to which the plan is subject to the Employee Retirement Income Security Act of 1974, as amended (ERISA).¹ Some 403(b) plans sponsored by certain private sector tax-exempt organizations, such as hospitals, are generally covered by ERISA and subject to its requirements, including those related to fiduciary duties. However, some 403(b) plans, such as 403(b) plans for public school teachers, are not subject to ERISA, including ERISA’s fiduciary requirements, although, these “non-ERISA” plans may be subject to state consumer protection laws or other state-specific fiduciary laws.

As we reported in March 2022, savings in 403(b) plans amounted to more than \$1.1 trillion in assets in 2020, and about one-half of these assets were held in non-ERISA plans. Moreover, we found that the fees participants were paying in both ERISA and non-ERISA 403(b) plans varied widely from plan to plan.²

¹ERISA establishes certain minimum standards and requirements for most private sector employer-sponsored retirement plans. As such, it does not apply to governmental plans, including federal and state government retirement plans. Title I of ERISA focuses primarily on the protection of participants’ benefits under a plan and includes requirements regarding reporting and disclosure, fiduciary responsibility, participation and vesting, and funding. For example, under ERISA a plan fiduciary must act solely in the interest of participants and beneficiaries and for the exclusive purpose of providing benefits and paying plan expenses, among other things.

²Additionally, our March 2022 report found that several school districts did not know the number of investment options or the fees associated with the 403(b) plans offered to participants in their districts. Our survey of 403(b) plan sponsors found that investment option fees ranged from 0.02 percent to 2.37 percent. See GAO, *Defined Contribution Plans: 403(b) Investment Options, Fees, and Other Characteristics Varied*, [GAO-22-104439](#) (Washington, D.C.: Mar. 4, 2022).

Like 401(k) plans, 403(b) plans are account-based defined contribution plans sponsored by employers, and generally individuals who participate in the plans make investment decisions and bear the investment risk.³ Certain aspects of 403(b) plans' structure and regulation differ from 401(k) and other defined contribution plans in key ways. For example, investment options are generally more limited for 403(b) plans than they are for other defined contribution plans in that amounts contributed into 403(b) accounts may generally be invested only in annuity contracts or custodial accounts that hold mutual funds.⁴

Given questions that have been raised regarding 403(b) plans and the protections afforded to participants, you asked us to examine these plans.⁵ This report examines: (1) the extent to which federal agencies conduct oversight of 403(b) plans, (2) actions selected states have undertaken that could improve 403(b) participant outcomes, and (3) options stakeholders and experts have identified that could improve outcomes for 403(b) participants.

To assess the extent to which federal agencies conduct oversight of 403(b) plans, we obtained and analyzed federal agency and regulatory

³A defined contribution plan is an employer-sponsored account based retirement plan, such as a 401(k) plan, that allows individuals to accumulate tax-advantaged retirement savings in an individual account based on employee or employer contributions, or both, and the investment returns (gains and losses) earned on the account. A defined benefit plan is an employer-sponsored retirement plan that typically provides a lifelong stream of payments beginning at retirement, based on a formula specified in the plan that takes into account factors such as the employee's salary, years of service, and age at retirement. See GAO, *The Nation's Retirement System: A Comprehensive Re-evaluation Is Needed to Better Promote Future Retirement Security*, [GAO-18-111SP](#) (Washington, D.C.: Oct. 18, 2017).

⁴See 26 U.S.C. § 403(b)(1) & (7). In addition, 401(k) plans can offer a wider range of investment products such as treasury notes or collective investment trusts. 403(b) assets may be invested in tax-preferred fixed or variable annuity contracts. With a fixed annuity, participants are guaranteed a specified rate of return on their contributions. For an indexed annuity, the income stream tracks with a specified index, such as the Standard & Poor's 500 Index. With a variable annuity, participants can direct their plan contributions to different investment options, usually mutual funds, to be held in their annuity account. For annuities, the amount of money participants receive in retirement will vary depending on various factors, which can include how much participants contribute, the type of investment options offered by the plan, the options selected by participants, the rate of return on the investments, and plan fees and expenses. For more information, see [GAO-22-104439](#).

⁵GAO issued a first report on the characteristics of and fees associated with 403(b) plans in March 2022; see [GAO-22-104439](#).

information on the number and types of violations relevant to 403(b) plans and service providers, investment vendors, broker dealers, or other service providers for 403(b) plans. Specifically, we obtained information on these violations from the Department of Labor's (DOL) Employee Benefits Security Administration (EBSA); the Securities and Exchange Commission (SEC); and the Internal Revenue Service (IRS). We also obtained information on violations from the Financial Industry Regulatory Authority, Inc. (FINRA), a nongovernmental self-regulatory organization registered with SEC as a national securities association.

In addition, we reviewed relevant federal laws and regulations. We also reviewed our prior work that discussed 403(b) plans.⁶ We obtained and analyzed guidance and educational materials provided by DOL and other relevant federal agencies, such as checklists, guidance documents, and other types of outreach to 403(b) plan sponsors and participants. We interviewed officials from DOL, IRS, SEC, and representatives from FINRA. We compared information we collected to the agencies' missions and *Standards for Internal Control in the Federal Government*.⁷ The Information and Communication component of internal control—particularly the principle of using quality information—was significant to this objective.

To describe actions selected states have undertaken that could improve 403(b) participant outcomes, we selected five states for review, spoke with state officials, and analyzed available information. We aimed to provide a range of state experiences and regulatory approaches by using the following criteria to select our states: whether or not the state limits the number of service providers of investment options (for the purposes of this report, referred to as open-access versus closed-access system); recent regulatory activity and reorganization regarding 403(b) plan administration in the state; and availability of fee data and plan provider

⁶In particular, see our September 2009 report. GAO, *Retirement Savings: Better Information and Sponsor Guidance Could Improve Oversight and Reduce Fees for Participants*, [GAO-09-641](#) (Washington, D.C.: Sept. 4, 2009); and [GAO-22-104439](#).

⁷See GAO, *Standards for Internal Control in the Federal Government*, [GAO-14-704G](#) (Washington, D.C.: September 2014).

information.⁸ We selected the following five states: California, Connecticut, Delaware, Kansas, and Texas. We asked officials in each selected state to identify relevant state laws. We reviewed available information including, where feasible, state 403(b) plan fees, policies, and other documentation from selected states. We did not conduct an independent legal analysis to verify the information provided about selected states' laws, regulations, or policies. We also interviewed officials in these five states. We submitted key report excerpts to agency officials in each state, as appropriate, for their review and verification, and we incorporated their technical corrections as appropriate. These case studies are not generalizable to the broader universe of 403(b) plans.

To discuss options that could improve outcomes for 403(b) participants, we interviewed stakeholders and experts in the retirement planning industry to identify and discuss such options. These stakeholders and experts included representatives of industry associations, research organizations, a national teacher's association, and service providers to 403(b) plans that we identified as being knowledgeable about 403(b) plans based on their published research or other documentation, or based on referrals from other organizations that we interviewed.⁹ Because we selected stakeholders and experts to interview, information obtained by these interviews is not generalizable.

To obtain more information about the feasibility and desirability of these identified options, we also analyzed responses from two surveys of

⁸We analyzed two studies that describe the different states' approaches to regulation of 403(b) broadly as being either open-access or closed-access systems. See TIAA-CREF Institute, *Trends and Issues – Who's Watching the Door? How Improving 403(b) Administrative Oversight Can Improve Educators' Retirement Outcomes* (November 2010), accessed June 15, 2022, <https://www.tiaa.org/public/institute/publication/2010/whos-watching-door-how-improving-403b>; and TIAA-CREF Institute, *Research Dialogue – 403(b) Plans for Public School Teachers: How They Are Monitored and Regulated in Each State* (March 2013), accessed June 15, 2022, <https://www.tiaa.org/public/institute/publication/2013/403b-plans-public-school-teachers>. We also reviewed a list from the National Tax-Deferred Savings Association (NTSA) that identifies the 17 state-sponsored 403(b) plans. See Michael Webb, *State Sponsored Plans: A Closer Look* (Arlington, Va.: National Tax-Deferred Savings Association), accessed Aug. 20, 2020, <https://www.ntsa-net.org/state-sponsored-403b-plans-closer-look>.

⁹In total, we interviewed stakeholders or experts from 23 organizations. Sixteen of these 23 organizations were interviewed in connection with data collection for our March 2022 report ([GAO-22-1044339](#)). Some of the information obtained in those interviews contributed to this report's findings. In this report, we use the term "several" to refer to three or four stakeholders and the term "multiple" to refer to five or more stakeholders.

403(b) plan sponsors and service providers.¹⁰ Because no comprehensive source of data on 403(b) plans sponsors or service providers exists, we used multiple sources to select our survey populations, as detailed in our March 2022 report, and surveyed these populations.¹¹ Our surveys included questions about actions, options, or policies that federal agencies could undertake to improve outcomes for 403(b) plan participants.¹² Because we actively selected survey populations and did not generate random samples in some populations, the results of the surveys are not generalizable.

In addition, to identify illustrative examples of approaches that different parties have undertaken to address participant concerns in 403(b) retirement plans, we identified and reviewed 18 settlement agreements from 2015 onward involving ERISA 403(b) plan participants, sponsors, or service providers.¹³ Because the nature of a settlement agreement depends on the specific facts and circumstances involved in the dispute, the results of our review of these settlement agreements are not generalizable. See appendix I for more details of our objectives, scope, and methodology.

We conducted this performance audit from December 2021 through June 2023 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to

¹⁰The surveys we conducted pertained to both our March 2022 report, [GAO-22-104439](#), as well as this report.

¹¹See [GAO-22-104439](#).

¹²We analyzed responses from our surveys of a total of 26 403(b) plan sponsors and 19 service providers. For the purposes of this report, we did not count one plan sponsor that was included in the previous report's plan sponsor survey reporting totals, because this plan sponsor did not answer either of the two questions relevant to this report. We did, in addition to those service providers included in the March 2022 report, include an additional two service providers who answered both of the relevant questions for this report but did not otherwise participate in the survey (and its applicable information for the March 2022 report).

¹³To identify settlements for analysis, we searched a legal database for cases concerning 403(b) plans, as well as performed a series of internet searches for 403(b)-related litigation, looking for cases that were settled, or where a judgment was entered, from 2015 onward. In addition, for context, we interviewed a representative of a plaintiffs' law firm involved in some of these cases who supplied us settlement agreements in which the firm was involved. According to this representative, the first case involving a 403(b) plan sponsor being sued by participants over alleged excessive fees or poorly performing investment options was settled in 2015. None of the settlement agreements we reviewed contained admissions of liability or wrongdoing by the parties.

obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

Background

ERISA 403(b) Plans

403(b) plans sponsored by certain private sector tax-exempt organizations, such as hospitals, research foundations, and private educational institutions, are generally covered by ERISA.¹⁴ ERISA outlines federal requirements that these ERISA 403(b) plans must meet, including requirements related to fiduciary duties.¹⁵ ERISA plan fiduciaries must act solely in the interest of participants and beneficiaries and for the exclusive purpose of providing benefits and paying plan expenses.¹⁶ ERISA also requires that plan fiduciaries act in a manner that generally avoids conflicts of interest.¹⁷ In other words, plan fiduciaries may not

¹⁴In certain circumstances, a 403(b) plan that meets certain criteria may qualify for a safe harbor exemption and as such would not be subject to ERISA. In order to fall under what we will refer to in this report as the “Limited Employer Involvement” safe harbor, employer involvement in the plan must be limited. See 29 C.F.R. § 2510.3-2(f); see also Department of Labor (DOL) Field Assistance Bulletin 2007-02 (July 24, 2007).

¹⁵Under ERISA, plan fiduciaries are individuals or entities who (1) exercise discretionary authority or discretionary control respecting management or a plan or exercise any authority or control respecting management or disposition of its assets; (2) provide investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of the plan or who have any authority or responsibility to do so; or (3) have any discretionary authority or discretionary responsibility for the administration of a plan.. According to DOL, plan fiduciaries generally include plan trustees, plan administrators, and members of a plan’s investment committee.

¹⁶See 29 U.S.C. § 1104.

¹⁷See 29 U.S.C. §§ 1106 and 1108.

engage in transactions on behalf of the plan that benefit the fiduciaries or other parties related to the plan, such as other service providers.¹⁸

Under ERISA, participants have the right to sue their plan fiduciaries (which may include the plan sponsor), for breach of fiduciary duty. In recent years, 403(b) participants have filed legal claims alleging that 403(b) plan sponsors breached fiduciary duties by failing to sufficiently monitor fees being charged by service providers or the performance of investment options.

Sponsors of ERISA 403(b) plans are required to provide participants with certain documents, including a summary plan description, as well as other documents that contain fee information, such as pension benefit statements, a summary comparison table that outlines administrative and individual account expenses, and a summary annual report.¹⁹ These documents may disclose additional information on fees individual participants pay, as shown in table 1.

Table 1: Selected Disclosure Documents Generally Required by ERISA That Include Information on Fees That Participants in 403(b) Plans May Receive

Document	Document purpose	Information on fees
Summary plan description	To explain to participants how the plan operates, outlining participant rights and benefits under the plan	May contain information on how various fees such as investment, recordkeeping, and loan fees are charged to participants.
Pension benefit statement	To show the account balance due to a participant	Typically identifies fees, such as for loans, that are directly attributable to an account during a specific period. Also, may show investment and record-keeping fees.
Summary annual report	To disclose the financial condition of the plan to participants	Contains total plan costs incurred by plan participants during the year.

¹⁸For example, someone in a position of trust, such as a pension plan adviser, may have competing professional or personal financial interests or incentives. A conflict of interest could occur should the structure of advisers' compensation and their other business arrangements create competing interests that may bias their investment recommendations to plan sponsors or participants. If left unchecked, conflicts of interest could lead plan sponsors or participants to select investment options with higher fees or that are not in line with their retirement goals, which, while beneficial to the service provider, could amount to a significant reduction in retirement savings over a worker's career. For more information, see GAO, *401(k) Plans: Improved Regulation Could Better Protect Participants from Conflicts of Interest*, [GAO-11-119](#) (Washington, D.C.: Jan. 28, 2011).

¹⁹See, for example, 29 C.F.R. § 2550.404a-5.

Document	Document purpose	Information on fees
Participant fee disclosures—administrative expenses	To disclose a plan's administrative and individual fees (e.g., account maintenance fees, participant loan fees)	Requires plan administrators to furnish at least annually information about administrative costs that may be charged to participants and beneficiaries in participant-directed individual account plans. Plan administrators also must disclose, at least quarterly, administrative and individual fees actually paid by participants and beneficiaries during the preceding quarter.
Participant fee disclosures—investment comparison chart	To ensure that participants are provided sufficient information regarding the plan's investment options, including fees and expenses	Requires plan administrators to furnish information about a plan's investment options including historical returns and associated fees and expenses, which must be presented in a format intended to facilitate comparisons between investment options. Investment information must be furnished to participants or beneficiaries on or before the date they can first direct their investments, and then annually thereafter. The Department of Labor (DOL) provides a model comparative chart, which may be used by the plan administrator to satisfy the requirement that a plan's investment information be provided in a comparative format.

Source: GAO analysis of the Employee Retirement Income Security Act of 1974, as amended (ERISA), and DOL information. | GAO-23-105620

Non-ERISA 403(b) Plans

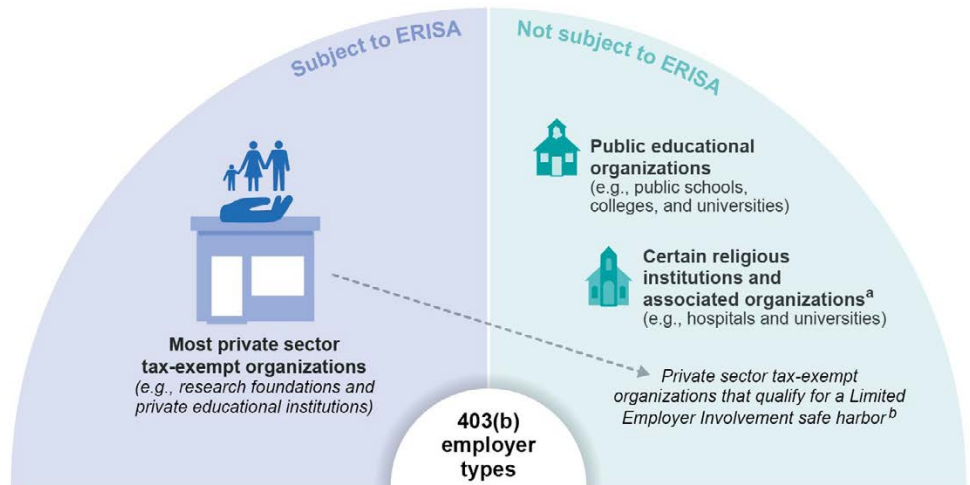
As noted earlier, not all 403(b) plans are subject to ERISA. The type of employer and, in certain cases, the extent to which the employer is involved in the plan can determine whether a plan is subject to ERISA. While ERISA plans must comply with ERISA-specific fiduciary duties, 403(b) plans that are not covered by ERISA (non-ERISA plans) are not subject to those requirements.²⁰ In addition, 403(b) plans sponsored by private sector tax-exempt organizations may qualify for a “Limited Employer Involvement” safe harbor (safe harbor) exemption and, as such, would not be subject to ERISA unless the plan fails to meet specific criteria.²¹ To fall under this safe harbor, participation in the plan must be voluntary, and employers are not allowed to contribute to the plan or make discretionary determinations in administering the plan, such as processing distributions, authorizing plan-to-plan transfers, or making

²⁰Non-ERISA plans may be required to comply with additional state consumer protection laws or other state-specific laws.

²¹As we reported in September 2009, DOL defined a “safe harbor” for 403(b) plans sponsored by tax-exempt organizations. Sponsors that follow the safe harbor guidelines are not considered subject to Title I of ERISA because the plan is considered not to have been “established or maintained by an employer.” Sponsors of these plans must restrict their involvement in the plan to certain actions, or they will become subject to Title I of ERISA. See [GAO-09-641](#).

determinations of eligibility for loans or hardship distributions. See figure 1 below for more details.

Figure 1: The Type of Employer and Extent of the Employer’s Involvement in the Plan Can Determine Whether a 403(b) Plan Is Subject to ERISA



Source: GAO analysis of Employee Retirement Income Security Act of 1974, as amended (ERISA); the Internal Revenue Code; and Department of Labor Regulations at 29 C.F.R. § 2510.3-2(f). | GAO-23-105620

Accessible Data for Figure 1: The Type of Employer and Extent of the Employer’s Involvement in the Plan Can Determine Whether a 403(b) Plan Is Subject to ERISA

403(b) employer types

- Subject to ERISA:
 - Most private sector tax-exempt organizations (e.g., research foundations and private educational institutions)
 - Private sector tax-exempt organizations that qualify for a Limited Employer Involvement safe harbor^b
- Not subject to ERISA:
 - Public educational organizations (e.g., public schools, colleges, and universities)
 - Certain religious institutions and associated organizations^a (e.g., hospitals and universities)

Source: GAO analysis of Employee Retirement Income Security Act of 1974, as amended (ERISA); the Internal Revenue Code; and Department of Labor Regulations at 29 C.F.R. § 2510.3-2(f). | GAO-23-105620

^aA retirement plan, including a 403(b) plan, may be what is commonly known as a “church plan.” Federal law defines a church plan as a plan established and maintained for its employees or beneficiaries by a church or by a convention or association of churches that are tax exempt under Internal Revenue Code section 501(a). This definition includes plans maintained by an organization whose principal purpose or function is the administration and/or funding of the plan for the employees of a church or convention or association of churches which is exempt under section 501 of the Internal Revenue provided that the organization is controlled by or associated with a church or

association of churches (e.g., a pension board that administers benefits for plan participants). See 26 U.S.C. § 414(e) and 29 U.S.C. § 1002(33).

^bIn certain circumstances, a 403(b) plan that meets certain criteria may qualify for a safe harbor exemption and as such not be subject to ERISA. To fall under the Limited Employer Involvement safe harbor, employer involvement in the plan must be limited. See 29 C.F.R. § 2510.3-2(f); see also Department of Labor Field Assistance Bulletin 2007-02 (July 24, 2007).

Non-ERISA 403(b) plans are subject to state laws and regulations, which may vary. For example, some states may have fiduciary laws that apply to certain 403(b) plans, while other states may not have such requirements. Different entities within a state may sponsor different 403(b) plans; for example, there may be one 403(b) plan for a state university system and other plans for K-12 school districts. In other cases, one 403(b) plan may cover multiple entities within a state. The rules that govern those 403(b) plans may differ; for example, according to two large providers with whom we spoke, some state regulations may apply to public universities but not K-12 schools in certain states.²²

States generally take one of two key approaches to regulating non-ERISA 403(b) plans, many of which are for state university and public K-12 school plans. For the purposes of this report, we will refer to these approaches as “closed- or open-access systems.” Specifically:

- **Closed-access system.** The plan selects one or a small number of service providers, known as “vendors,” to offer investment options to participants. In closed-access systems, plan participants select options from a range of investment products, offered by the selected vendor or vendors, which may or may not include the vendors’ proprietary products. Pooling assets together into a more limited number of investment products may allow the plan sponsor to obtain administrative cost efficiencies and economies of scale. In closed-access systems, the relationships between plan sponsors, participants, and vendor resemble those typical of 401(k) plans, according to two experts and one stakeholder we interviewed.
- **Open-access system.** States do not restrict the number of vendors that can sell investment products to a potential participant. States using open-access systems may have laws with an “any willing vendor” provision that requires 403(b) plans for public sector workers to allow any vendor selected by a participant to provide investment

²²For additional information, see National Tax-Deferred Savings Association, *State Sponsored 403(b) Plans: A Closer Look* (Arlington, Va.: 2020). In many states, the primary retirement savings plan for public sector workers is a defined benefit pension and the 403(b) plan is supplemental.

options for the plan. A participant could be selecting from among dozens or even hundreds of investment options from potentially dozens of vendors; in March 2022 we reported that one 403(b) plan from a sponsor who had responded to our survey had once contained as many as 1,600 investment options.²³ The relationship between a participant and a plan’s service providers may, according to several stakeholders we interviewed, more closely resemble Individual Retirement Accounts (IRA) than what one typically would find in 401(k) plans.²⁴

Whether a state uses a closed- or open-access system generally determines if the employer (i.e., the plan sponsor) or the participant controls the contract with the investment provider (see sidebar). In a closed-access state, where the state or a designated entity within it acts as the employer and administrator of the state’s 403(b) plan investment options, contracts are generally employer controlled, whereas in an open-access state where participants can work with any vendor, the contracts are generally participant controlled, according to stakeholders we consulted.

Employer-controlled vs. Non-employer-controlled 403(b) Contract Systems

According to a service provider and an expert we interviewed, in an employer-controlled contract, the employer has the unilateral right to move money out of a contract to another provider or investment. By contrast, in a participant-controlled contract, the participant controls the movement of assets, and if an employer wants to move assets, it must obtain the participant’s permission to do so.

In an open-access state, employees generally have the legal right to any provider, as long as other conditions are met, such as a minimum number of participants opting for that provider. A closed-access state allows the employer to limit the number of providers.

According to a large service provider, open states’ contracts are individually participant controlled; they are not group contracts. For example, a school district in a certain state may have 30 payroll providers. Managing 30 payroll providers may be unwieldy, so the school or plan may let them be managed individually. By contrast, a large university is more likely to choose a dedicated provider for its investment options, according to experts we spoke with.

Source: GAO interviews with 403(b) plan experts and stakeholders. | GAO-23-105620

²³[GAO-22-104439](#).

²⁴In this report, we use the term “several” to refer to three or four stakeholders we interviewed, the term “multiple” to refer to five or more stakeholders we interviewed. Though we asked about many of these options in our surveys, we did not systemically ask all of our interview subjects about each of the options. For more information on our methodology, see appendix I.

In addition, sponsors of non-ERISA 403(b) plans are not subject to disclosure requirements under ERISA—such as the fee comparison described in table 1 above—although these plans may be subject to state laws on disclosures.²⁵ As a result, the information about fees that participants in different state and local government plans receive may vary, depending on the state and locality in which they are employed. As mentioned below, broker-dealers that make recommendations to 403(b) plan participants are covered by SEC rules that mandate other disclosures and other investor protections.²⁶

Roles of Federal and State Agencies

Federal agencies and Financial Industry Regulatory Authority, Inc. (FINRA) have a role in regulating and overseeing both ERISA and non-ERISA 403(b) plans or investment options provided to participants, as described in figure 2.

²⁵See [GAO-09-641](#), which further notes that this applies to all plans not subject to Title I of ERISA.

²⁶Broker-dealers are persons or entities who are in the business of buying or selling securities on behalf of customers, on behalf of their own account, or both. Under Regulation Best Interest, broker-dealers that make recommendations of securities or investment strategies to retail customers have a general obligation to act in a retail customer's best interest, which is satisfied only if the broker-dealer complies with four specified component obligations: disclosure, care, conflict of interest, and compliance. Under the care obligation, broker-dealers must exercise reasonable diligence, care, and skill when making a recommendation to a retail customer to, among other things, understand the potential risks, rewards, and costs associated with the recommendation, and have a reasonable basis to believe that the recommendation could be in the best interest of at least some retail customers. See 17 C.F.R. § 240.15l-1 (a)(2)(ii)(A). Further, the broker-dealer must have a reasonable basis to believe the recommendation is in the best interest of a particular retail customer based on that retail customer's investment profile. See 17 C.F.R. § 240.15l-1(a)(2)(ii)(B). In addition, the conflict of interest obligation requires broker-dealers to establish, maintain, and enforce written policies and procedures reasonably designed to, among other things, identify and at a minimum disclose, or eliminate, all conflicts of interest associated with a recommendation and identify and mitigate (i.e., modify practices to reduce) conflicts of interest at the associated person level. See 17 C.F.R. § 240.15l-1(a)(2)(iii).

Figure 2: Summary of Federal Roles in Regulating and Overseeing 403(b) Plans and Investment Options

Federal agency or self-regulatory organization (logo)	Federal agency or self-regulatory organization	Role in regulating and overseeing 403(b) plans
	The Department of Labor (DOL)	DOL's Employee Benefits Security Administration (EBSA) administers and enforces Title I of ERISA. EBSA's mission includes ensuring the security of the retirement, health, and other workplace-related benefits of private-sector workers and their families. EBSA has stated it accomplishes this mission by developing regulations, assisting and educating plan sponsors, fiduciaries, and service providers, as well as enforcing the law. DOL also conducts enforcement of ERISA through civil and criminal investigations of retirement and health plans and by encouraging plans to voluntarily remedy any violations identified by EBSA's regional office investigative staff, such as by restoring plan or participant assets, paying for erroneously denied services, and making needed administrative changes.
	Securities and Exchange Commission (SEC)	The SEC regulates fee disclosure for some vehicles that are offered as retirement plan investment options, such as variable annuity products and mutual funds. The SEC requires these vehicles to disclose fees in a prospectus, a document that provides key information to help investors make informed investment decisions. A mutual fund's prospectus contains fund information such as the investment objectives or goals, strategies for achieving those goals, risks of investing in the fund, expenses (including fees), and past performance. Through Regulation Best Interest, the Investment Advisers Act of 1940, and the Investment Company Act of 1940, the SEC regulates certain activities, including providing advice and recommendations, in connection with securities and investment strategies involving securities offered by entities registered under the Investment Company Act of 1940, including mutual funds and variable annuities. The SEC's Division of Examinations administers the SEC's nationwide examination and inspection program for registered self-regulatory organizations, broker-dealers, transfer agents, clearing agencies, investment companies, and investment advisers. The SEC may also bring enforcement actions under the antifraud provisions of the Securities Act of 1933 and the Securities Exchange Act of 1934.
	The Financial Industry Regulatory Authority, Inc. (FINRA)	FINRA is a nongovernmental, self-regulatory organization, authorized by statute and registered with the SEC as a national securities association. Among other things, FINRA writes and enforces rules governing the activities of securities broker-dealer firms and their representatives, and examines broker-dealers for compliance with FINRA rules and federal securities laws. FINRA also provides regulatory services to other self-regulatory organizations such as compliance examinations and enforcement.
	Internal Revenue Service (IRS)	The IRS administers the Internal Revenue Code (IRC), including provisions related to 403(b) retirement plans. Among its responsibilities, the IRS is to ensure that taxpayers comply with the tax law, including requirements related to maintaining a plan's tax-deferred status. The IRS has an examination program to ensure employee benefit plans comply with the IRC. During its examinations of 403(b) plans, the IRS determines whether the plan is maintained in accordance with IRC requirements, including having a written plan document, following universal availability rules ^a and ensuring that elective deferrals do not exceed IRC limits.

Source: GAO analysis of DOL, SEC, FINRA, and IRS information. | GAO-105620

²⁶U.S.C. § 403(b)(12)(A)(ii). According to IRS information, if any employee of the employer maintaining the 403(b) plan may defer more than \$200 of salary into the plan, then all of the employer's employees must be given the opportunity to defer more than \$200 of salary into the plan unless a permitted exclusion applies.

In addition to these federal agencies, state insurance officials may also be in charge of administering and enforcing state laws regarding certain investment options offered in 403(b) plans—including fixed and indexed annuities—which may vary by state.²⁷

Several Federal Agencies Take Steps to Oversee 403(b) Plans and Investment Options, but DOL Has Limited Educational Materials Targeted to These Plans

Multiple Federal Agencies Oversee and Enforce Different Aspects of 403(b) Plans and Investment Options

DOL

DOL conducts some oversight through enforcement activities related to ERISA 403(b) plans and service providers, along with 401(k) and other ERISA plans and service providers.²⁸ As we have previously reported, DOL conducts oversight through enforcement of ERISA plans using a

²⁷With a fixed annuity, participants are guaranteed a specified rate of return on their contributions. Indexed annuities are a particular type of annuity that combines features of securities and insurance products. In this type of annuity, an insurance company promises that participants' contributions will grow at a rate of return based on a market index, such as the Standard & Poor's 500 Index. According to SEC officials, most fixed and indexed annuities are not securities and so are not subject to the federal securities laws or SEC regulation.

²⁸DOL officials stated that many investigations are directed not at the plan level, but at the service providers of multiple plans. For example, a national enforcement initiative investigating issues related to fiduciary service provider compensation and conflicts of interest in relation to plan assets identified a service provider as having violations in this area in its administration of a university 403(b) plan and a health care system 403(b) plan. As noted earlier, non-ERISA plans are not subject to ERISA's fiduciary requirements, although these plans may be subject to state consumer protection laws or other state-specific fiduciary laws. Accordingly, DOL administers and enforces reporting and disclosure and fiduciary provisions for retirement plans, including ERISA 403(b) plans.

range of strategies to identify plans to investigate.²⁹ For example, DOL targets enforcement investigations for greater impact, by, among other things, prioritizing plans that have large numbers of participants or amounts of assets. According to agency officials, DOL includes 403(b) plans through these larger enforcement investigation strategies rather than focusing solely on 403(b) plans. These officials told us that DOL identifies violations in ERISA 403(b) plans through its more general enforcement investigations for defined contribution plans.

DOL's enforcement investigations have included ERISA 403(b) plans, which in some cases have resulted in monetary recoveries. Specifically, from fiscal years 2010 through 2021, DOL identified violations in about 70 percent of its 454 enforcement investigations of ERISA 403(b) plans.³⁰ DOL's actions resulted in more than \$35 million in monetary recoveries from its enforcement investigations of 403(b) plans during this time period, of which about \$13 million, or 38 percent, were from major cases.³¹ According to DOL's data for fiscal year 2019, the agency examined less than 1 percent of ERISA 403(b) plans.³² Figure 3 presents additional information regarding DOL's enforcement investigations that have included 403(b) plans.

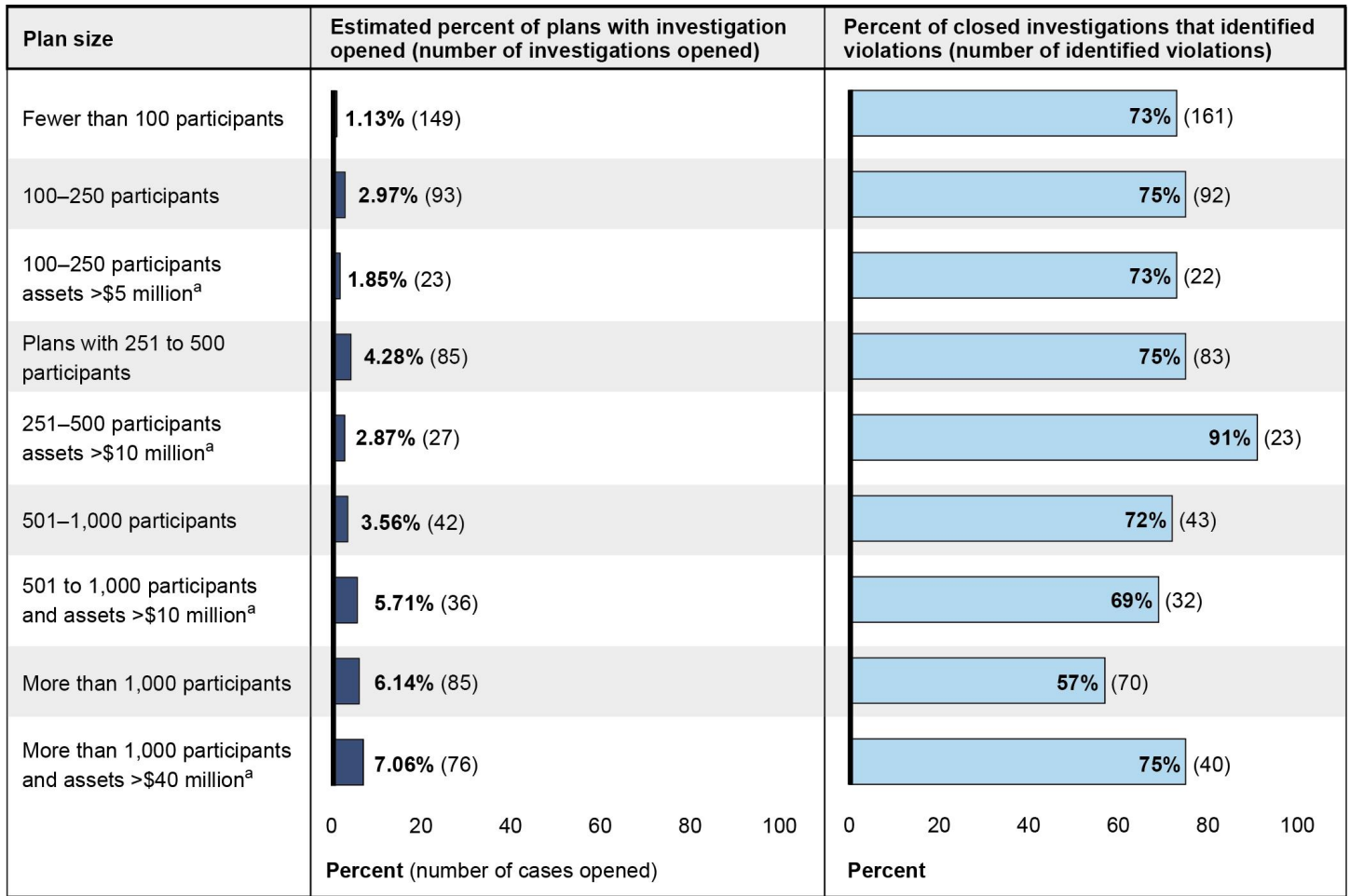
²⁹DOL officials stated the agency has about one investigator for every 10,000 to 12,000 plans. DOL establishes investigation processes and provides policy direction, technical investigative assistance, and oversight to about 400 enforcement personnel at national and regional offices. For more information on DOL's organizational structure and processes for monitoring and enforcing employer-sponsored retirement plans, see GAO, *Employee Benefits Security Administration: Enforcement Efforts to Protect Participants' Rights in Employer-Sponsored Retirement and Health Benefit Plans*, [GAO-21-376](#) (Washington, D.C.: May 27, 2021).

³⁰Similarly, according to data provided from DOL, from fiscal years 2010 through 2021, DOL identified violations in about 77 percent of its closed cases involving 401(k) plans.

³¹For 403(b) investigations, 162, or 36 percent, during the time period met participant and asset thresholds to be classified as major cases. DOL identified major cases as those that result in a loss recovery plan of \$5 million or more; for defined contribution plans with 100–250 participants, a recovery of 10 percent of plan assets (for which recovery is at least \$500,000), among other conditions. DOL officials said that other criteria besides the described participant and asset thresholds could constitute a major case.

³²Agency data show that in fiscal year 2019, DOL opened an investigation on 35, or 0.17 percent, of ERISA 403(b) plans.

Figure 3: Information on Department of Labor’s (DOL) Enforcement of 403(b) Plan Cases, Fiscal Years 2010–2021



Source: GAO analysis of DOL data. | GAO-23-105620

Accessible Data for Figure 3: Information on Department of Labor’s (DOL) Enforcement of 403(b) Plan Cases, Fiscal Years 2010–2021

Plan size	Estimated percent of plans with investigation opened (number of investigations opened)	Percent of closed investigations that identified violations (number of identified violations)
Fewer than 100 participants	1.13% (149)	73% (161)
100–250 participants	2.97% (93)	75% (92)
100–250 participants assets >\$5 million ^a	1.85% (23)	73% (22)
Plans with 251 to 500 participants	4.28% (85)	75% (83)
251–500 participants assets >\$10 million ^a	2.87% (27)	91% (23)

Plan size	Estimated percent of plans with investigation opened (number of investigations opened)	Percent of closed investigations that identified violations (number of identified violations)
501–1,000 participants	3.56% (42)	72% (43)
501 to 1,000 participants and assets >\$10 million ^a	5.71% (36)	69% (32)
More than 1,000 participants	6.14% (85)	57% (70)
More than 1,000 participants and assets >\$40 million ^a	7.06% (76)	75% (40)

Source: GAO analysis of DOL data. | GAO-23-105620

^aMet DOL participant and asset thresholds to be classified as major cases. DOL identified major cases as those that result in a loss recovery plan of \$5 million or more; payments to plan participants totaling \$1 million or more; and for defined contribution plans with 100–250 participants, a recovery of 10 percent of plan assets (for which recovery is at least \$500,000), among other conditions. DOL officials said that other criteria besides the described participant and asset thresholds could constitute a major case.

Notes: GAO tabulated the total number of plans of a particular plan size using 2019 Form 5500 data. The Form 5500 data were used to estimate the percentage of plans investigated.

According to DOL’s enforcement data, among the most common violations found from fiscal years 2010 through 2021 were breaches of fiduciary duties, imprudent administration, and failure to discharge duties for the exclusive purpose of providing benefits to participants and beneficiaries.³³ For example, during this time period, DOL identified 200 violations for fiduciary self-dealing, which DOL officials told us could happen when a fiduciary uses plan assets for the fiduciary’s own interest or own account. Table 2 presents the results for this and other types of violations DOL frequently identified during its enforcement investigations that have included 403(b) plans.

Table 2: Most Frequent Violations the Department of Labor (DOL) Identified for 403(b) Plan Cases Closed, Fiscal Years 2010–2021

Violation type	Explanation of violation type	Number of cases cited with that violation
Not providing benefits prudently and for exclusive purpose of providing benefits to participants and beneficiaries See 29 U.S.C. § 1104(a)(1)(A), (B)	The fiduciary did not discharge duties solely in the interests of the participants and beneficiaries, for the exclusive purpose of providing benefits to participants and their beneficiaries and defraying reasonable expenses of administering the plan, and with the care, skill, prudence, and diligence under the circumstances that a prudent person acting in a like capacity and familiar with such matters would use.	321

³³DOL officials stated that the types of violations identified for 403(b) plan administration were similar for 401(k) and other defined contribution plans.

Letter

Violation type	Explanation of violation type	Number of cases cited with that violation
Other substantive imprudence See 29 U.S.C. § 1104 (a)(1)(B)	Not acting in accordance with the care, skill, prudence, and diligence under the circumstances that a prudent person acting in a like capacity and familiar with such matters would use.	255
Fiduciary self-dealing See 29 U.S.C. §1106(b)(1)	Fiduciaries dealt with plan assets for their own self-interest, among other things.	200
Other 406(b)(2) See 29 U.S.C. §1106(b)(2)	The fiduciary acted in any transaction involving the plan on behalf of a party whose interests were adverse to the interests of the plan or the interests of its participants or beneficiaries.	199
Plan assets not to inure to benefit of employer See 29 U.S.C. § 1103(c)(1)	The assets of a plan were used improperly for the benefit of an employer or were not held for the exclusive purpose of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan.	172
Delinquent contributions See 29 U.S.C. § 1106(a)(1)(D)	Failure to timely remit contributions to the plan.	172
Disclosure violation See e.g., 29 U.S.C. § 1021(a); 29 C.F.R. § 2520.104b-2	Summary plan description or other required information not furnished to participants and beneficiaries.	60
Failure to establish trust See 29 U.S.C. § 1103(a)	Assets of an employee benefit plan were not held in trust by one or more trustees, who are to be named in the plan or trust instrument or appointed by a person who is a named fiduciary.	56

Source: GAO analysis of DOL data. | GAO-23-105620

Note: The table presents information on cases that DOL closed during the time period; there may be some cases conducted during this time frame that have identified violation but are still open.

DOL’s enforcement efforts do not include verifying whether certain 403(b) plans comply with the conditions of the safe harbor. As previously noted, 403(b) plans from private sector tax-exempt organizations that fall within the conditions for the Limited Employer Involvement safe harbor are exempt from ERISA.³⁴ In our September 2009 report, we found that DOL did not have the specific authority to collect information to help ensure that sponsors of certain 403(b) plans protect participants’ interests—including those of tax-exempt organizations—and may fall outside the safe harbor.³⁵ We recommended that Congress consider giving DOL specific authority to collect information to systematically monitor safe harbor 403(b) plans. Such authority would allow DOL to identify and determine whether any such plans are operating outside the safe harbor conditions and are subject to ERISA and the protections it affords to

³⁴See 29 C.F.R. § 2510.3-2(f).

³⁵[GAO-09-641](#).

participants.³⁶ As of March 2023, Congress has not addressed this matter. We continue to believe that giving DOL this specific authority would help the agency conduct its oversight.

SEC

SEC's examination and enforcement activities focus on overseeing investment vehicles, like mutual funds and variable annuities, and ensuring that broker-dealers and associated persons involved in the sales of 403(b) investment options comply with applicable federal securities laws and regulations.³⁷ These efforts include helping to ensure that the recommendations and actions of registered broker-dealers who may be selling those securities to 403(b) plan participants comply with applicable requirements. For example, the SEC oversees whether conflicts of interest when a broker-dealer recommends a security are properly disclosed, and mitigated (that is, reduced) or eliminated, if necessary, in the sale of a security.³⁸ The SEC also oversees whether fees in connection with the sale of a security are properly disclosed.³⁹

According to SEC officials and agency documentation, the agency completes about 3,000 examinations each year, and many of these examinations of broker-dealers and investment advisers involve

³⁶For example, DOL might be able to coordinate with the IRS to help identify private sector tax-exempt organizations that sponsor a 403(b) plan and may be using the Limited Employer Involvement safe harbor. Specifically, using information from certain tax filings, including Form W-2, Employer Identification Number (EIN), and Exempt Organizations Business Master File Extract data, agencies could identify if an organization is a tax-exempt, nongovernmental, and nonchurch entity with a 403(b) plan. In addition to these data, ERISA 403(b) plans annually file a Form 5500 while non-ERISA safe harbor plans do not. By combining these data, DOL could identify 403(b) plans sponsored by tax-exempt organizations that do not file the Form 5500. These plans would include those potentially using the safe harbor. DOL and IRS officials said the agencies share some information and may refer specific cases as part of their oversight responsibility for 403(b) plans, but these efforts do not include information to systematically identify plans potentially using the safe harbor.

³⁷In some cases, the results of SEC examinations are referred to the SEC's Division of Enforcement for potential enforcement activity. This report discusses and covers the SEC's oversight through its examination process, and selected results of SEC enforcement activities are also provided.

³⁸According to SEC officials, retirement products offered by vendors without any recommendation are not subject to Regulation Best Interest.

³⁹See 17 C.F.R. § 240.15l-1(a)(2)(i)(A)(2); *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 194 (1963).

investment products included in 403(b) plan accounts. SEC officials told us the agency generally does not collect data to identify whether 403(b) investment options or service providers were involved in any specific SEC examination of an SEC registered entity because examinations are generally scoped to look at broader compliance issues or investment options, or both.⁴⁰

The SEC also has filed enforcement actions related to misconduct by 403(b) providers. For example, in July 2022, the SEC announced fraud charges against a life insurance company for providing account statements to about 1.4 million variable annuity investors that included materially misleading statements and omissions concerning investor fees. As described in the SEC's order, since at least 2016, the insurance company gave investors the false impression that their quarterly account statements listed all fees paid during the period. The SEC's investigation found that, in reality, the statements listed only certain types of fees that investors infrequently incurred and that more often than not the statements had \$0.00 listed for fees. The insurance company agreed to pay \$50 million to harmed investors, most of whom are public school teachers and staff members, to settle the charges.

Additionally, in July 2020, the SEC charged a financial services company in a pair of actions for failing to disclose to teachers and other investors practices that generated millions of dollars in fees and other financial benefits for the company. In the first action, according to documentation we reviewed, the SEC found that the financial services company failed to disclose that its parent company paid a for-profit entity owned by Florida K-12 teachers' unions to promote the financial services company and its parent company services to teachers. In the second action, the SEC found that the financial services company failed to disclose conflicts of interest regarding its receipt of millions of dollars of financial benefits that directly resulted from advisory client mutual fund investments that were generally more expensive for clients than other mutual fund investment options available to clients. SEC officials said they expect these actions will result in significant savings for thousands of teachers.

⁴⁰Accordingly, the SEC's examinations include examinations of broker-dealers and investment advisers.

FINRA

FINRA's oversight activities focus on ensuring that broker-dealers and their associated persons—who may be involved in the sales of 403(b) investment options—comply with applicable FINRA rules and federal securities laws and regulations.⁴¹ For example, FINRA's efforts include oversight of broker-dealers' compliance with FINRA Rule 2330, which requires broker-dealers, when recommending purchases or exchanges of deferred variable annuities, to meet specified obligations. These obligations include appropriately informing customers (including those who are participants in 403(b) plans) about any applicable fees, among other things.⁴² FINRA representatives told us that since 2005, FINRA has brought 28 disciplinary actions against broker-dealers and associated persons that mention 403(b) retirement accounts.⁴³

According to FINRA representatives, the largest sanction imposed against a broker-dealer was an \$8 million fine plus payment of \$89 million in restitution to affected customers for violations. These violations included the firm's failure to identify and apply sales charge waivers to eligible retirement accounts, including 403(b) accounts, and weaknesses in the broker-dealers' supervisory systems. Ten of the disciplinary actions resulted in bars against individuals and 12 involved charges against

⁴¹FINRA is a nongovernmental, self-regulatory organization, authorized by statute and registered with the SEC as a national securities association.

⁴²FINRA Rule 2330 governs recommended purchases and exchanges of deferred variable annuities and recommended initial subaccount allocations. Further, Rule 2330 applies to 403(b) plans where a firm or its representatives makes recommendations to an individual plan participant regarding a deferred variable annuity. The rule specifies that no member or person associated with a member shall recommend to any customer the purchase or exchange of a deferred variable annuity unless such member or person associated with a member has a reasonable basis to believe, among other things, that (1) the customer would benefit from certain features of deferred variable annuities, such as tax-deferred growth, annuitization, or a death or living benefit, and (2) the customer has been informed in general terms of various features of deferred variable annuities, such as the potential surrender period and surrender charge, potential tax penalty if customers sell or redeem deferred variable annuities before reaching the age of 59½, investment advisory fees, and market risk, among other things.

⁴³FINRA representatives compiled and provided GAO summary data in May 2022 that they stated were those cases that mentioned 403(b) plans from 2005 onward from FINRA's publicly available enforcement database. GAO conducted its own search of the database and identified 32 documents that mentioned 403(b) plans from 2005 through December 2022. According to FINRA representatives, there are more entries in the FINRA database than the number of cases because a few cases have more than one related document (e.g., Complaint and Offer of Settlement or Decision) in the database.

individuals for forging customer signatures or otherwise altering 403(b) account-related documents, according to FINRA representatives.

According to FINRA representatives, two of the 28 cases that mention 403(b) plans involved violations of FINRA's rule regarding selling variable annuities (FINRA Rule 2330). One, a March 2021 settlement with a firm, resulted in a censure and fine of \$15,000 for violations including FINRA Rule 2330. The other was an August 2015 decision by FINRA's Office of Hearing Officers against a different firm, imposing a \$50,000 fine for violations of FINRA rules, including FINRA Rule 2330, as well as applicable costs for the proceeding.

IRS

The IRS's oversight activities focus on ensuring that 403(b) plans comply with Internal Revenue Code requirements through its examination program for 403(b) plans. For example, The IRS ensures that participants are not contributing to tax qualified retirement plans, including 403(b) plans, in higher-than-permissible amounts. IRS data indicate the agency completed 1,912 examinations involving 403(b) plans from fiscal years 2011 through 2020. Its examinations identified tax compliance issues in about 82 percent of these examinations.⁴⁴ IRS officials stated that the IRC is complicated and highly nuanced, and that it is challenging for a plan or service provider to be in full compliance with all of its provisions. The top three tax compliance issues IRS examinations identified during the time period were universal availability (328 instances), non-return unit 403(b) plan, other concern (261 instances), and excessive contributions (209

⁴⁴According to IRS officials, the agency has identified higher rates of tax compliance issues in 403(b) plans than in 401(k) plans. Officials stated that the higher rate of tax compliance issues among 403(b) plans may be due to small employers that have a more difficult time understanding and complying with the relevant laws. IRS officials told us the issues the agency generally sees in smaller 401(k) and 403(b) plans are specific to each type of plan.

instances).⁴⁵ In addition, IRS officials told us that if the agency discovers a possible breach of fiduciary duty by a 403(b) plan under ERISA, the IRS has a program to refer the issue to DOL.⁴⁶

Federal Agencies Provide Outreach and Educational Materials, but DOL Has Limited Information Targeted to 403(b) Plans

As part of their oversight activities, DOL, SEC, and IRS provide outreach and educational materials to 403(b) plan sponsors and participants.⁴⁷ However, we found that DOL's guidance on retirement plans focused primarily on 401(k) plans and that references to 403(b) plans may not be easily identified by plan sponsors and participants.

DOL

DOL's benefits advisors conduct education and outreach events for workers, employers, and plan sponsors. DOL data indicate that the agency conducted 20,673 outreach events of various types from fiscal year 2012 through March of fiscal year 2022. About 4,190 (or 20 percent)

⁴⁵According to IRS information, under the universal availability requirement, if any employee of the employer maintaining the 403(b) plan may defer more than \$200 of salary into the plan, then all of the employer's employees must be given the opportunity to defer more than \$200 of salary into the plan unless a permitted exclusion applies. Non-return unit plans are those that have compliance or tax qualification requirements that did not file a Form 5500; IRS officials stated these were often small 403(b) plans that had difficulty understanding and complying with the requirements for operating a 403(b) plan, and noted not all—particularly non-ERISA plans—were required to file a Form 5500. Excess contributions are contributions to a participant's 403(b) retirement account in excess of the limit on annual additions (the combination of all employer contributions and employee elective salary deferrals to all 403(b) accounts).

⁴⁶IRS officials stated that the IRS has had a list of referrals to DOL since the beginning of 2021. However, the list is not broken down by plan type so it cannot specifically identify 403(b) plans. Officials said the IRS began tracking referrals in 2021 because of a request by DOL. However, IRS officials stated it does not see a business need to track referrals since it does not impact the agency's examination cases.

⁴⁷We did not review FINRA because its activities are oriented toward the rules and regulations applicable to registered broker-dealers and their associated persons. FINRA representatives did tell us that they have a department focused on investor education and a wholly owned subsidiary, the FINRA Investor Education Foundation, that focuses on financial well-being more broadly.

of these events were public awareness events.⁴⁸ Agency officials told us these events are not specific to 403(b) plans, and are aimed at enhancing a general understanding of retirement and other workplace-based benefits.⁴⁹

DOL officials told us that the audiences at its outreach events—small businesses and participants—are not familiar with the law, so the outreach is done at a basic level with information that applies across defined contribution plans and other workplace-based benefits.⁵⁰ DOL officials said attendees can ask questions related to their specific types of plans, and stated this approach is effective given their limited resources.

In addition to outreach efforts, DOL also provides guidance and educational materials on its website related to 403(b) plans, as shown in figure 4.

⁴⁸In addition, DOL conducted 13,091 participant outreach events between fiscal years 2012 and 2022. DOL officials said compliance assistance event audiences include fiduciaries, service providers, and employers. Other outreach events are participant assistance activities, including rapid response events designed to educate employees facing job loss about their rights. DOL officials also told us the agency fields around 200,000 inquiries from the general public per year. Fewer than 1,000 of those inquiries per year concern 403(b) plans, according to DOL officials.

⁴⁹As we reported in May 2021, EBSA dramatically increased the number of dedicated worker events in fiscal year 2020, designed to educate employees facing job loss, among other items. See [GAO-21-376](#).

⁵⁰Five of the 25 plan sponsors that responded to our survey stated that they would like more information regarding whether ERISA applies to certain 403(b) plans, and also stated they would like more information regarding the applicability of safe harbors. For full results of our surveys of 403(b) plan sponsors and service providers, see appendix III.

Figure 4: Educational Materials on the Department of Labor’s (DOL) Website Regarding Reporting and Coverage for 403(b) Plans

The screenshot shows the U.S. Department of Labor website. At the top, there is a dark blue header with the U.S. Department of Labor logo and the text "U.S. DEPARTMENT OF LABOR". Below this, the text "Employee Benefits Security Administration" is visible on the left, and a blue "MENU" button is on the right. The main heading is "Reporting and Coverage for 403(b) Plans". Below the heading is a link for "Collapse All". The content is organized into several expandable sections, each with a downward arrow icon:

- Guidance**
 - [Field Assistance Bulletin 2007-02](#)
Subject: ERISA Coverage Of IRC § 403(b) Tax-Sheltered Annuity Programs
Issue: How do the Department of the Treasury/Internal Revenue Service regulations governing Internal Revenue Code § 403(b) tax-sheltered annuity programs affect the status of such programs under the Department of Labor's safe harbor regulation at 29 C.F.R. § 2510.3-2(f)?
 - [Field Assistance Bulletin 2009-02](#)
Subject: Form 5500 Reporting by IRC § 403(b) Plans Covered by Title I of ERISA
Issue: Guidance on transition relief from new requirements for IRC § 403(b) Plans for Form 5500 annual reporting of information on certain individual annuity contracts and mutual fund custodial accounts of current and former employees that were entered into before 2009 and for which the employer has no ongoing contribution obligation.
 - [Field Assistance Bulletin 2010-01](#)
Subject: Annual Reporting and ERISA Coverage for 403(b) Plans
Issue: This FAB supplements Field Assistance Bulletin 2009-02 by responding to questions concerning the scope of and conditions for transition relief provided by FAB 2009-02. The FAB also responds to questions concerning the scope of the Department's safe harbor regulation at 29 CFR 2510.3-2(f).
- Publications**
 - [Reporting and Disclosure Guide for Employee Benefit Plans](#)
 - [Meeting Your Fiduciary Responsibilities](#)
 - [Selecting an Auditor for your Employee Benefit Plan](#)
 - [Troubleshooter's Guide to Filing the ERISA Annual Report \(Form 5500 and Form 5500 SF\)](#)
- Electronic Filing**
 - [EFAST2](#)
- Reporting and Filing**
 - [Reporting and Filing](#)
- Voluntary Correction Programs**
 - [Voluntary Correction Programs](#)
- IRS Resources**
 - [Retirement Plans FAQs regarding 403\(b\) Tax-Sheltered Annuity Plans](#)
 - [Publication 571, Tax-Sheltered Annuity Plans \(403\(b\) Plans\) for Employees of Public Schools and Certain Tax-Exempt Organizations](#)

Source: DOL website for 403(b) plan information. | GAO-23-105620

Accessible Data for Figure 4: Educational Materials on the Department of Labor’s (DOL) Website Regarding Reporting and Coverage for 403(b) Plans

Depiction of DOL’s Reporting and Coverage for 403(b) Plans webpage

Guidance

- Field Assistance Bulletin 2007-02

Subject: ERISA Coverage Of IRC § 403(b) Tax-Sheltered Annuity Programs

Issue: How do the Department of the Treasury/Internal Revenue Service regulations governing Internal Revenue Code § 403(b) tax-sheltered annuity programs affect the status of such programs under the Department of Labor’s safe harbor regulation at 29 C.F.R. § 2510.3-2(f)?

- Field Assistance Bulletin 2009-02

Subject: Form 5500 Reporting by IRC § 403(b) Plans Covered by Title I of ERISA

Issue: Guidance on transition relief from new requirements for IRC § 403(b) Plans for Form 5500 annual reporting of information on certain individual annuity contracts and mutual fund custodial accounts of current and former employees that were entered into before 2009 and for which the employer has no ongoing contribution obligation.

- Field Assistance Bulletin 2010-01

Subject: Annual Reporting and ERISA Coverage for 403(b) Plans

Issue: This FAB supplements Field Assistance Bulletin 2009-02 by responding to questions concerning the scope of and conditions for transition relief provided by FAB 2009-02. The FAB also responds to questions concerning the scope of the Department’s safe harbor regulation at 29 CFR 2510.3-2(f).

- Publications
 - Reporting and Disclosure Guide for Employee Benefit Plans
 - Meeting Your Fiduciary Responsibilities
 - Selecting an Auditor for your Employee Benefit Plan
 - Troubleshooter’s Guide to Filing the ERISA Annual Report (Form 5500 and Form 5500 SF)
- Electronic Filing
 - EFAST2
- Reporting and Filing
 - Reporting and Filing
- Voluntary Correction Programs
 - Voluntary Correction Programs
- IRS Resources
- Retirement Plans FAQs regarding 403(b) Tax-Sheltered Annuity Plans
- Publication 571, Tax-Sheltered Annuity Plans (403(b) Plans) for Employees of Public Schools and Certain Tax-Exempt Organizations

Source: DOL website for 403(b) plan information. | GAO-23-105620

Notes: DOL's website for 403(b) plans is at <https://www.dol.gov/agencies/ebsa/employers-and-advisers/plan-administration-and-compliance/retirement/reporting-and-coverage-for-403b-plans>. Figure information is current as of April 2023.

Specifically, the website includes three Field Assistance Bulletins on 403(b) plans,⁵¹ and a number of publications intended to educate plan fiduciaries and participants on defined contribution plans and other workplace-based plans more generally, such as publications entitled *Meeting Your Fiduciary Responsibilities* and *Reporting and Disclosure Guide for Employee Benefit Plans*.⁵²

However, we found that the educational materials on DOL's website lack the same level of detailed information on 403(b) plans as for 401(k) plans. Moreover, this information may not provide details that 403(b) plan sponsors or participants find useful for making informed decisions involving plan fees. For example, EBSA's website, *Understanding Your Retirement Plan Fees*, and its brochure, *What You Should Know About Your Retirement Plan*, refer only to 401(k) plan fees.⁵³ In addition, another guide EBSA developed to help participants understand their plan fees, *A Look at 401(k) Plan Fees*, does not reference 403(b) plans. However, many of the fees described in this guide, such as administrative fees and expense ratios, are also applicable to 403(b) plans.

Similarly, our review of other content on the agency's website found that much of its educational materials could be relevant to several types of retirement plans, including ERISA 403(b) plans. However, these materials do not highlight 403(b) plans or make these commonalities among retirement plans clear to readers. For example, the information in EBSA guides for plan sponsors, such as *FAQs about Retirement Plans and ERISA* and *Target Date Retirement Funds – Tips for ERISA Plan Fiduciaries*, are also applicable to any 403(b) plan sponsor looking for

⁵¹See Department of Labor, *Field Assistance Bulletin 2007-02* (July 24, 2007); *Field Assistance Bulletin 2009-02* (July 20, 2009); and *Field Assistance Bulletin 2010-01* (Feb. 17, 2010).

⁵²DOL's 403(b) website is at <https://www.dol.gov/agencies/ebsa/employers-and-advisers/plan-administration-and-compliance/retirement/reporting-and-coverage-for-403b-plans>.

⁵³See <https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/publications/understanding-your-retirement-plan-fees> and <https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/publications/what-you-should-know-about-your-retirement-plan.pdf>.

guidance in complying with ERISA, but DOL does not make this clear.⁵⁴ DOL's website provides a disclosure tool for 401(k) plans that contains material that could also be used or adapted for use by 403(b) plans, as well as a model comparative chart to satisfy a requirement that information on a plan's investment options be provided in a comparative format.⁵⁵ DOL included these documents on its 401(k) website, as shown in figure 5, but does not include them on its 403(b) website.

⁵⁴See <https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/faqs/retirement-plans-and-erisa-compliance.pdf> and <https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/fact-sheets/tips-for-selecting-and-monitoring-service-providers.pdf>.

⁵⁵See <https://www.dol.gov/agencies/ebsa/employers-and-advisers/plan-administration-and-compliance/retirement>. For the chart, see <https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/publications/providing-information-in-participant-directed-plans-model-chart.doc>.

Figure 5: Educational Materials on the Department of Labor’s Website Regarding Reporting and Coverage for 401(k) Plans

The screenshot shows the U.S. Department of Labor website for the Employee Benefits Security Administration. The page title is "Reporting and Coverage for 401(k) Plans". Under the "Publications" section, several links are listed, with three highlighted in red boxes: "Understanding Retirement Plan Fees And Expenses", "Target Date Retirement Funds - Tips for ERISA Plan Fiduciaries", and "FAQs on Retirement Plans and ERISA". Under the "Tools" section, a description of the "401(k) Plan Fees Disclosure Tool" is highlighted in a red box. A red text note on the right side of the page reads: "Examples of materials provided for 401(k) plans that could be updated to include 403(b) plans." Arrows point from this note to the three red-highlighted links and the tool description.

U.S. DEPARTMENT OF LABOR
Employee Benefits Security Administration MENU

Reporting and Coverage for 401(k) Plans

[Collapse All](#)

▼ Publications

- [Meeting Your Fiduciary Responsibilities](#)
- [Understanding Retirement Plan Fees And Expenses](#)
- [Selecting An Auditor For Your Employee Benefit Plan](#)
- [Selecting and Monitoring Pension Plan Consultants - Tips for Plan Fiduciaries](#)
- [Tips for Selecting and Monitoring Service Providers for Your Employee Benefit Plan](#)
- [Target Date Retirement Funds - Tips for ERISA Plan Fiduciaries](#)
- [Reporting and Disclosure Guide for Employee Benefit Plans](#)
- [401\(k\) Plans For Small Businesses](#)
- [FAQs on Retirement Plans and ERISA](#)
- [FAQs on the Small Pension Plan Audit Waiver Regulation](#)
- [Exemption Procedures Under Federal Pension Law](#)

▼ Tools

[401\(k\) Plan Fees Disclosure Tool](#) – A form developed by banking, insurance and mutual fund trade groups to provide employers with a way to collect and compare investment fees and administrative costs of competing providers of plan services. This form was not developed by the Department and was not designed to ensure compliance with the Department's [regulations on service provider fee disclosure to plans](#) or [plan fee disclosure to 401\(k\) plan participants and beneficiaries](#).

- [Voluntary Correction Programs](#)

▼ Guidance

- [EXPRO Exemptions Under Prohibited Transaction Exemption 96-62](#)
- [Individual Exemptions Under Title I of ERISA](#)
- [Class Exemptions Under Title I of ERISA](#)

▼ Fiduciary Requirements for Disclosure in Participant-Directed Individual Account Plans

- [Final Rule](#) • [Fact Sheet](#) • [Model Chart](#) • [DOL No-Action Letter Request](#) • [SEC No-Action Letter](#)

▼ Fiduciary Requirements for Disclosure in Participant-Directed Individual Account Plans - Timing of Annual Disclosure

- [Direct Final Rule](#) • [Proposed Rule](#) • [Fact Sheet](#)

▼ Service Provider Disclosures Under Section 408(b)(2)

- [Final Rule](#) • [Fact Sheet](#) • [Changes to Final Fee Disclosure Rule](#) • [Sample Guide](#) • [Fee Disclosure Failure Notice](#)

▼ Lifetime Income Illustration

- [Advance Notice of Proposed Rulemaking](#) • [Calculator](#)

Examples of materials provided for 401(k) plans that could be updated to include 403(b) plans.

Source: DOL website for 401(k) plan information. | GAO-23-105620

Accessible Data for Figure 5: Educational Materials on the Department of Labor’s Website Regarding Reporting and Coverage for 401(k) Plans

Depiction of DOL’s Reporting and Coverage for 403(b) Plans webpage highlighting the following sections as examples of materials provided for 401(k) plans that could be updated to include 403(b) plans:

- Publications:
 - Understanding Retirement Plan Fees And Expenses
 - Target Date Retirement Funds - Tips for ERISA Plan Fiduciaries
 - FAQs on Retirement Plans and ERISA
- Tools:

401(k) Plan Fees Disclosure Tool – A form developed by banking, insurance and mutual fund trade groups to provide employers with a way to collect and compare investment fees and administrative costs of competing providers of plan services. This form was not developed by the Department and was not designed to ensure compliance with the Department’s regulations on service provider fee disclosure to plans or plan fee disclosure to 401(k) plan participants and beneficiaries.

Source: DOL website for 401(k) plan information. | GAO-23-105620

Notes: DOL’s 401(k) website is at <https://www.dol.gov/agencies/ebsa/key-topics/retirement/401k-plans>. Figure information is current as of April 2023.

Several experts and stakeholders we interviewed told us that additional educational materials targeted to 403(b) plans could help plan sponsors or participants better understand the nuances of these plans and help them make informed decisions to ensure their retirement objectives are met. For example, two industry stakeholders, along with one industry expert, suggested that small plan sponsors could obtain information on leading industry practices on plan management, including how to navigate relationships with third-party administrators or other service providers.

The mission of DOL’s EBSA is, among other things, to ensure the security of the retirement benefits of America’s workers and their families. The agency states it accomplishes this mission, in part, by assisting and educating workers, plan sponsors, fiduciaries, and service providers. Additionally, federal standards for internal control state that organizations should provide quality information to external stakeholders, and that effective information and communication, including quality information to

external parties, are vital for an organization to achieve its objectives.⁵⁶ This includes providing quality information to clarify requirements and responsibilities. In this case, DOL's online materials to assist and educate plan sponsors, fiduciaries, service providers, and participants do not reference 403(b) plans—plans that millions of teachers and employees of nonprofits depend on for their retirement.

DOL officials told us that the agency's 401(k) publications could help ERISA 403(b) plan sponsors, participants, and other interested parties to evaluate fees and expenses in those plans. DOL officials told us they would consider reviewing the relevant publications on its 403(b) website to assess whether the agency should include more content targeted to 403(b) plans.

DOL can update its educational materials specific to 403(b) plans to help 403(b) plan sponsors and participants make informed investment decisions. Such information could include a checklist or evaluative tools for 403(b) plans that plan sponsors and participants could use to assess 403(b) plan fees. Additionally, providing explicit references to 403(b) plans in its existing online educational materials would help 403(b) plan sponsors and participants identify resources intended to help them make informed decisions in the context of complex investment options.

SEC

The SEC has developed targeted outreach and informational materials for 403(b) plan sponsors and participants. Specifically, in 2019, according to SEC officials, the SEC announced a new, nationwide Teachers' Initiative, led by the SEC's Division of Enforcement in partnership with the SEC's Office of Investor Education and Advocacy.⁵⁷ SEC officials told us it would build on a San Francisco Regional Office Teacher Investment Outreach

⁵⁶See GAO, *Standards for Internal Control in the Federal Government*, [GAO-14-704G](#) (Washington, D.C.: September 2014). We assessed DOL's informational materials against internal control principles 13.01 and 15.01.

⁵⁷<https://www.sec.gov/news/press-release/2019-85>.

program, as detailed in the sidebar.⁵⁸ According to SEC documentation, the initiatives will increase proactive outreach to teachers to educate them about savings and investment, investment fees and expenses, retirement programs specific to educators, and the red flags of investment fraud.

The SEC’s San Francisco Regional Office Outreach Activities Related to 403(b) Plans

In 2017, the Securities and Exchange Commission’s (SEC) San Francisco Regional Office (SFRO) staff launched the Teacher Investment Outreach Initiative to better understand the investment education needs of public school employees and to provide tools to help them with their investment decisions. According to SEC officials, in researching this topic, SFRO staff uncovered several challenges in this area, including:

- investment education tools with incomplete information;
- overwhelming investment product choices offered by employers;
- aggressive marketing efforts by some of the vendors offering investment products;
- possible conflicts of interest due to affiliations between plan administrators and vendors; and
- no fiduciary requirement on 403(b) plans.

As part of these local outreach efforts, according to SEC officials, since 2017 SFRO staff have attended industry conferences, education workshops, benefits fairs, union events and hosted three Retirement Investment Summit on Education (RISE of California) events geared toward getting the word out to California educators who were investing in 403(b)s, as well as industry stakeholders in this space. SEC officials stated that by 2018, staff in other SEC regional offices launched similar outreach efforts.

Source: GAO interviews of SEC officials. | GAO-23-105620

In addition to these outreach efforts, the agency also has provided teacher-oriented investor education materials through a website with consumer protection information, including information regarding 403(b) plans that is specifically aimed at teachers, as shown in figure 6.

⁵⁸In addition, according to SEC officials, since 2019, the SEC’s SFRO and Los Angeles Regional Office staff have engaged in quarterly meetings with various federal and state regulators relating to activities and issues in the non-ERISA 403(b) space in California through the Teacher Investment Regulatory Roundtable. These meetings are used to share information on what each agency or entity is seeing and doing in this area and to discuss regulatory gaps and overlap among regulators in the non-ERISA 403(b) space. According to SEC officials, other participants include representatives from DOL, Consumer Financial Protection Bureau, California Office of the Attorney General, the California Department of Insurance, the California Department of Financial Protection and Innovation, and FINRA.

Figure 6: Securities and Exchange Commission (SEC) Educational Materials for 403(b) Plan Sponsors and Participants

The screenshot displays the SEC Investor.gov website. At the top, the SEC logo and 'U.S. SECURITIES AND EXCHANGE COMMISSION' are visible, along with a search bar and navigation links. The main content area features 'Investor Publications' with a section titled 'Evaluating Your Retirement Options' dated June 9, 2008. Below this, there is a section for 'What Is a 403(b) Plan?' and a navigation menu with categories like 'Introduction to Investing', 'Financial Tools & Calculators', 'Protect Your Investments', and 'Additional Resources'. A prominent feature is a guide for teachers, 'A Guide for Teachers: Saving and Investing for K-12 Educators', which includes a link to 'Teacher_Investing_Guide.pdf (925.01 KB)'. A red arrow points from this link to a separate section at the bottom of the page. This section, titled 'Investor Alerts & Bulletins', features a 'Tips for Teachers: Investing for Retirement -- Updated Investor Bulletin' dated July 18, 2022. To the right of this section is a list of 'Additional Resources' including links to investment options, vendor selection, and product choice guides for teachers.

Source: SEC websites. | GAO-23-105620

Accessible Data for Figure 6: Securities and Exchange Commission (SEC) Educational Materials for 403(b) Plan Sponsors and Participants

Screenshots of Investor.gov website with consumer protection information, including information regarding 403(b) plans that is specifically aimed at teachers.

Source: SEC websites. | GAO-23-105620

Note: Figure information current as of March 2023.

On the SEC's websites, including Investor.gov, a number of guides are available, including *A Guide for Teachers: Saving and Investing for K-12 Educators and Tips for Teachers: Investing for Retirement – Updated Investor Bulletin*.⁵⁹ The SEC's San Francisco Regional Office also developed a flyer for outreach to teachers. The document notes: "Investment options and costs can vary and be complicated. Don't assume that your employer has screened or approved any particular investment product or any firm or professional that sells 403(b) investments. This is why it's so important to do some homework on your own to be sure your investment choices are the best for you, in light of your personal circumstances and financial objectives."

In addition to its website, SEC officials also noted that the agency provides teacher-orientated investor education materials through social media. Officials told us continued public education efforts are important, in light of recent enforcement outcomes and a perceived lack of education regarding 403(b) investment options among some 403(b) participants.

IRS

IRS officials told us the agency focuses on providing information on 403(b) tax compliance issues. To provide outreach to tax professionals, the agency provides information specific to 403(b) plan administration at industry events, and offers educational materials and services to increase

⁵⁹See <https://www.investor.gov/additional-resources/general-resources/publications-research/publications/guide-teachers-saving> and <https://www.sec.gov/oiea/investor-alerts-and-bulletins/tips-teachers-investing-retirement-investor-bulletin>.

understanding and compliance by tax-exempt organizations, public schools and universities, and others who might offer these plans.⁶⁰

To support its efforts to educate plan sponsors and participants, the IRS has several publications on its website. These publications may help 403(b) plan sponsors and participants understand how to comply with IRC requirements, such as plan contribution limits. For example, in November 2022, the IRS issued updated guidance to allow plan sponsors to obtain preclearance from the IRS that their proposed 403(b) plan documents meet IRC requirements.⁶¹

Other IRS materials relevant to 403(b) plans include *IRS Publication 571, IRC 403(b) Tax-Sheltered Annuity Plans* webpage, the *IRS 403(b) Plan Checklist*, and the *IRS Retirement Plans FAQs regarding 403(b) Tax-Sheltered Annuity Plans*.⁶² For example, the IRS's Plan Checklist notes the importance for plan administrators to review the requirements for operating the 403(b) plan each year. It also asks 403(b) plan sponsors to confirm that the plan's operations are based on a written plan document, and that any elective deferrals are within deferral limits for that year.

Selected States Reported Taking Actions to Strengthen Plan Oversight and Transparency of Investment Options for Non-ERISA 403(b) Plans

Officials we interviewed from the five selected states—California, Connecticut, Delaware, Kansas, and Texas—reported taking a range of actions to improve participant outcomes. We reviewed how five selected

⁶⁰For example, IRS officials said they presented information regarding the IRS's 403(b) plan determination program and plan pre-approval program at events at four retirement industry conferences and events in 2022.

⁶¹IRS Rev. Proc. 2022-40 permits the submission of determination letter applications for 403(b) individually designed plans. Among other things, this revenue procedure also modifies the circumstances under which a plan is considered to have been issued an initial plan determination.

⁶²See <https://www.irs.gov/pub/irs-pdf/p571.pdf>, <https://www.irs.gov/retirement-plans/irc-403b-tax-sheltered-annuity-plans>, <https://www.irs.gov/pub/irs-pdf/p4546.pdf>, and <https://www.irs.gov/retirement-plans/retirement-plans-faqs-regarding-403b-tax-sheltered-annuity-plans>.

states worked to improve outcomes—including in three cases reducing fees participants pay—in 403(b) plans that are not subject to ERISA requirements. For example, officials in four of the five selected states reported taking one or more actions to strengthen plan sponsors' oversight. In addition, officials in four of the five selected states said they took action to enhance transparency.⁶³

Strengthening Oversight

Officials in four of the five selected states reported taking action to improve participant outcomes in non-ERISA 403(b) plans by strengthening the oversight of plan investment options. In particular, officials in these states reported strengthening oversight by (1) centralizing the administration of non-ERISA 403(b) plans in their state using a closed system with a limited number of service providers, (2) enacting laws or regulations to help ensure the plan is operated in the best interest of participants, or (3) adopting a request for proposal process (RFP) for selecting vendors.⁶⁴

Centralizing Program Administration

Officials in three of the five selected states—Connecticut, Delaware, and Kansas—reported centralizing the administration of 403(b) plans and limiting the number of service providers used by a plan, measures that can strengthen plan oversight.⁶⁵ An expert and two stakeholders we interviewed said limiting the number of providers creates a more direct and active role for the plan sponsor in vetting investment options offered

⁶³We did not conduct an independent legal analysis to verify the information provided about the laws, regulations, or policies of the countries selected for this study. For more information on non-ERISA 403(b) plan administration and oversight in each of the five selected states, including other information regarding, for example, how often the state recompetes its service contracts and whether the state has adopted elements of ERISA as best practices, see appendix II.

⁶⁴For detailed information on each of these selected states' actions, see appendix II.

⁶⁵For Kansas, this refers to the plan provided for Kansas Board of Regents employees. We also note that while California is an open-access system state, it has a statewide California State Teachers Retirement System (CalSTRS) Pension2 plan.

to participants and ensuring options are economically beneficial to participants.⁶⁶

Stakeholders and plan sponsors stated this consolidation may result in a more simplified process and lower fees for participants. For example, according to documentation we reviewed and state officials we spoke with, Connecticut had 66 vendors offering hundreds of investment options, and then in 2002, after the legislature transferred authority over the plan to the Office of the State Comptroller, narrowed the list of authorized providers to six. Over time the state has consolidated its plan further to have one service provider offering 14 investment options. Connecticut officials said centralized administration of the plan has resulted in significant cost savings for participants.

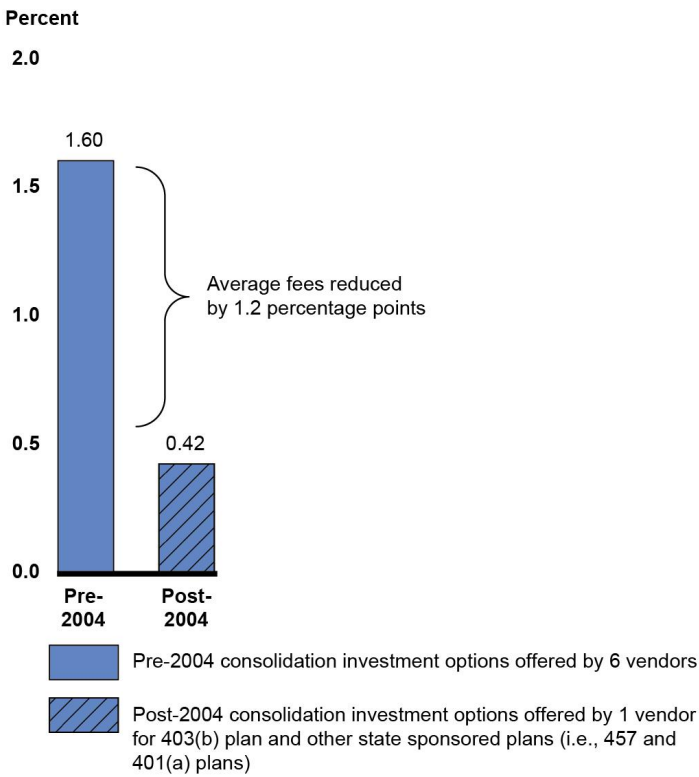
Several stakeholders noted that a centralized structure allows for the hiring of expert staff to administer and oversee the plan and ensure investment options meet participants' interests. For example, an official in Delaware reported that the state became a closed-access system in 2016 and now uses a plans management board to manage and administer the state's 403(b) plan. The state official said that by centralizing the program structure, the state, via the Plans Management Board, is able to select service providers, including investment options vendors, for the plan based on fees, among other things. The official from Delaware stated the plan was able to achieve economies of scale by plan consolidation, resulting in lower fees for participants. As a result, the official said in recent years the board reduced fees for the plan's investment options from a maximum of 4.17 percent annually to between 0.05 to 0.87 percent annually for its participants. As part of its contract, the plan's service provider sends participants quarterly statements of investment fund performance and administrative and investment option fees similar to those required under ERISA.

⁶⁶According to documentation provided by a selected state, historically, 403(b) plan sponsors typically offered individual or participant-controlled contracts, meaning the participant was the contract holder and only the participant could transfer assets to a new contract. A state official noted that participant-controlled contracts made it administratively difficult to monitor the plan and could interfere with the plan sponsor's ability to exercise its fiduciary duty to remove unsuitable investments. Therefore, the official said, the industry has been reducing the number of approved service providers and moving toward group or employer-controlled contracts for 403(b) plans.

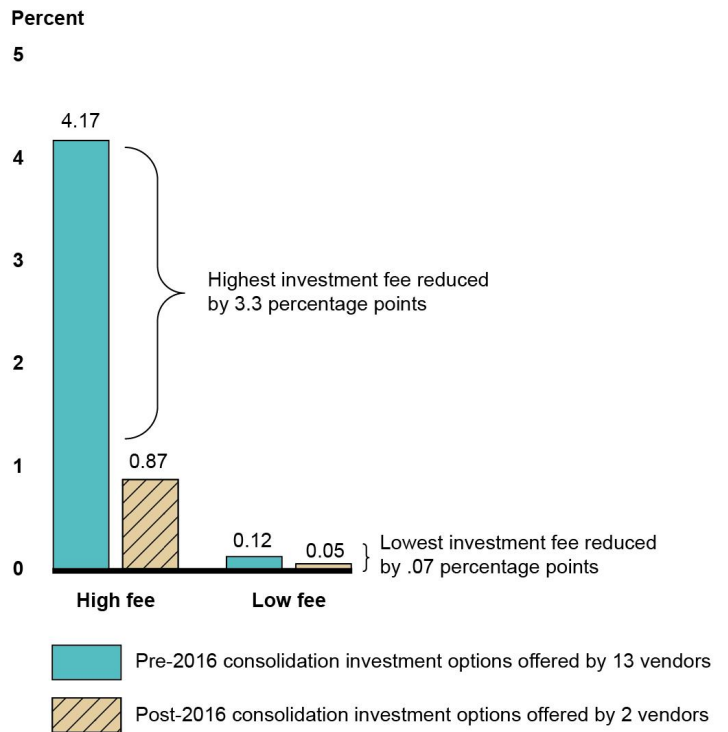
Figure 7 provides details on the reduction in fees that two states reported when moving toward a closed, consolidated system.⁶⁷

Figure 7: Investment Fees Pre- and Post-403(b) Plan Consolidation, as Reported by Two Selected States

Connecticut: Average investment fees pre- and post-2004 consolidation



Delaware: Highest and lowest investment fees pre- and post-2016 consolidation



Source: GAO analysis of state provided documentation and interviews with state officials. | GAO-23-105620

⁶⁷In addition to Connecticut and Delaware, a Kansas official also reported reducing certain fees for investment options for the plan provided for employees of the Kansas Board of Regents and educational institutions under the Board's management. For more information, see appendix II.

Accessible Data for Figure 7: Investment Fees Pre- and Post-403(b) Plan Consolidation, as Reported by Two Selected States

Bar chart 1: Connecticut: Average investment fees pre- and post-2004 consolidation

- Pre-2004 consolidation investment options offered by 6 vendors, 1.60%
- Post-2004 consolidation investment options offered by 1 vendor for 403(b) plan and other state sponsored plans (i.e., 457 and 401(a) plans), 0.42
- Average fees reduced by 1.2 percentage points

Bar chart 2: Delaware: Highest and lowest investment fees pre- and post-2016 consolidation

- Pre-2016 consolidation investment options offered by 13 vendors
 - High fee, 4.17%
 - Low fee, 0.12%
 - Highest investment fee reduced by 3.3 percentage points
- Post-2016 consolidation investment options offered by 2 vendors
 - High fee, 0.87%
 - Low fee, 0.05%
 - Lowest investment fee reduced by .07 percentage points

Source: GAO analysis of state provided documentation and interviews with state officials. | GAO-23-105620

Notes: Connecticut state officials stated that data regarding preconsolidation administrative fees were not available. Post consolidation in 2004, Connecticut's plan investment fees ranged from 0.02 percent to 0.58 percent, and according to plan documentation resulted in a weighted average expense ratio that includes the proportion of the funds' assets across all investment option allocations of 0.42 percent. Post consolidation the administrative fee is 0.0285 percent, according to state documentation. Delaware's 403(b) data included high and low fees pre and post consolidation, but not an average across all investment options. Delaware officials stated that preconsolidation participants paid between \$0 and \$65 per participant as an administrative fee. Because the administrative fee is a flat charge per participant account, we did not include it in the graphic. Post-consolidation, Delaware participants paid an up to 0.13 percent maximum per participant administrative fee.

In contrast to centralizing the program administration, the other two selected states—California and Texas—reported using an open-access system that allows participants to select from a broader range of investment providers. For example, in 2019 Texas moved to an open-access system and removed investment option fee caps. These changes would provide teachers access to a greater number of investment options and services and investment products that may have higher returns, according to the bill sponsor's statement of intent accompanying the enacted legislation. Specifically, according to the bill sponsor statement supporting the 2019 change, the legislation was intended to repeal authority that the Teachers Retirement System Board in Texas previously

held, including its authority to cap fees. According to the bill sponsor's statement, limiting fees could reduce investment product offerings and a company's ability to offer services that provide valuable advice and educational tools that can assist teachers in making appropriate choices for their retirement income.

As another example, an industry association guide for plan sponsors noted there is a 25 percent greater participation rate in 403(b) plans with 15 or more investment providers compared to plans with only one provider.⁶⁸ Further, the guide noted that decreasing the number of plans, or consolidating all participants into a single plan type, minimized the number of advisers available to assist participants with information about their 403(b) plans. The guide stated that this may have contributed to declines in plan participation.⁶⁹

Enacting Statutory and Regulatory Protections for Participants

Officials in three of the selected states—Connecticut, Delaware, and Kansas—reported taking recent actions to enhance participant protections, which can strengthen oversight. These reported actions included establishing fiduciary duties for plan sponsors or administrators or enacting state regulations requiring vendors of annuities, including those offered as 403(b) plan investment options, to act in the best interest of participants. The sidebar provides information on the various types of standards of care, such as fiduciary standards, that may be afforded through law or regulation at the federal or state level to protect participants' interests.

⁶⁸See National Tax-Deferred Savings Association, *403(b) Plan Sponsor Guide: A Comprehensive Guide for Public Education 403(b) Retirement Plans*, accessed March 3, 2022, <https://ntsa-cres.org/wp-content/uploads/2019/04/CRES-403b-Plan-Sponsor-Guide-All-Version-2.pdf>.

⁶⁹However, according to one selected state, participation has increased since the plan's consolidation. An official from Delaware reported that in March 2015, as the state began its RFP process toward plan consolidation, there were 13 vendors, and 5,700 participants were contributing to the State's 403b plan. As of April 2023, there were more than 6,600 participants actively contributing to the plan.

Types of Standards of Care

Fiduciary: Fiduciary standards, such as those provided by ERISA or by state law, are generally designed to ensure certain parties act prudently and solely in the interest of plan participants and beneficiaries, typically including avoiding conflicts of interest, and further specifying that the fiduciary is to diversify plan investments so as to minimize the risk of large losses and to only pay reasonable expenses to administer the plan and invest its assets.

Best interest: Best interest standards, such as those provided by SEC Regulation Best Interest or state law, are generally designed to enhance and clarify the standards of conduct applicable to broker-dealers and investment advisers, help retail investors better understand and compare the services offered, and make an informed choice of the relationship best suited to their needs and circumstances, particularly at the point in time that a recommendation is made.

Suitability: Some states may have laws that seek clear standards for annuity sales so consumers understand the products they purchase, are made aware of any material conflicts of interest, and are assured those selling the products do not place their financial interests above consumers' interests.

These definitions are provided solely for the purpose of clarity in this report and may not be generalizable to other discussions of these terms.

Source: GAO review of Department of Labor (DOL), Securities and Exchange Commission (SEC), and National Association of Insurance Commissioners documentation. | GAO-23-105620

For example, a state official reported that Delaware created a state board overseeing non-ERISA 403(b) plan administration, with fiduciary duties including selecting investment options and monitoring fees and administrative costs. The legislation establishing Delaware's Plans Management Board states that the board and its members shall discharge their duties solely in the interests of the participants and beneficiaries of the plan, and each shall act with the care, skill, and diligence of a prudent person acting in a like capacity and familiar with such matters.⁷⁰

Similarly, an official in Kansas reported the state adopted a law that applies fiduciary duties to the Kansas Board of Regents' 403(b) plan.⁷¹ That plan's investment policy also states, in part, that the board shall address its fiduciary obligations by acting with skill, care, prudence, and diligence in all matters relating to the plan, and performing its duties in the interests of the participants and their beneficiaries.

⁷⁰The Delaware official cited the Plans Management Board, Del. Code Title 29 Ch. § 2722. The board also has a policy document that states, for example, that no fees shall be paid by the plan unless they are direct expenses of the plan, no fees shall be paid unless they are reasonable, and expenses for salaries and benefits for staff who support the plans, including the state's 403(b) plan, may be allocated proportionally across the plans based on asset values.

⁷¹A Kansas official cited GC Kansas Uniform Trust Code, K.S.A. 58a-101, et seq.

However, officials told us that some state laws designed to protect plan participants do not apply to 403(b) plans. For example, according to a Connecticut Office of the State Comptroller official, state law specifies that Connecticut's Retirement Commission shall have general supervision of the operation of the retirement system, will conduct the business and activities of the system, and each trustee shall be a fiduciary with respect to the retirement system. However, this law does not specifically apply to the state's 403(b) plan, as it is under the supervision of the State Comptroller's Office, according to this official.⁷² As another example, an industry expert said that in California, sponsors of 457(b) plans are subject to fiduciary duties under state law, but sponsors of non-ERISA 403(b) plans in the state are not.⁷³ According to this expert, having fiduciary duties apply to these 403(b) plans in California would lead to better outcomes for participants.

Other stakeholders and an expert we interviewed said that upholding fiduciary duties at the state level presents challenges. Two stakeholders and an expert stated that some school districts, especially smaller school districts, may not have the resources or necessary technical expertise to assume a fiduciary-like role and administer the plan in the best interest of participants. According to one of these stakeholders that represented public school teachers, especially in K-12 education and for other non-ERISA plans, the employers left employees to largely figure things out on their own. Even if they were paying reasonable fees, participants could wind up in investments that were not a good fit, the stakeholder said. The stakeholder stated that in some cases 403(b) participants have been invested 100 percent in fixed annuities early in their careers, and this may not provide sufficient long-term investment returns compared to other investment options.

⁷²Further, annuities included as a 403(b) plan investment option may be exempt from certain protections. Department of insurance officials in Texas noted that a provision in state law designed to ensure agents act in the best interest of participants when selling annuities does not apply to 403(b) plans. For more information on this and other selected states' laws governing fixed and indexed annuities, see appendix II.

⁷³In a 457 plan, both sponsors and participants are typically permitted to make pre-tax contributions. 457 plans can be open to all employees at a state or local government. Other 457 plan types exist for managerial or highly compensated employees and are unfunded. For more information, see [GAO-09-641](#).

Adopting a Request for Proposal Process in Selecting Service Providers

Officials in four of the five selected states—California, Connecticut, Delaware, and Kansas—reported strengthening plan oversight by using a request for proposal (RFP) process.⁷⁴ This process provides the plan sponsor with competitive bids they can compare across providers when selecting investment options for the plan. For example, Connecticut’s contract for a third party administrator to provide services and work directly with the investment providers for its 403(b) plan is rebid every 5 years, a process known as “recompeting.” The stated purpose of Connecticut’s RFP is to solicit proposals from qualified firms to obtain the highest-quality services at the most favorable cost.⁷⁵

Enhancing Transparency

Officials in four of the selected states—California, Connecticut, Delaware, and Kansas—reported taking action to improve participant outcomes in non-ERISA 403(b) plans by enhancing transparency of the plan’s investment offerings in one or both of two key ways: (1) compiling a publicly available registry of administrative fees and expense ratios for investment options, or (2) requiring plan administrative and investment options’ fees be provided to participants.⁷⁶

Registry of Investment Options and Fees

Officials in three of the five selected states—California, Connecticut, and Kansas—reported enhancing transparency by adopting measures to

⁷⁴An RFP is a competitive bid process to select providers. Plan sponsors that use an RFP process generally consider competitive bids from service providers based on service types and levels, fees, and other considerations. For California, this refers to the CalSTRS Pension2, and for Kansas, this refers to the plan provided for employees of the Kansas Board of Regents and educational institutions under the Board’s management. The extent to which other plans in California or Kansas conduct an RFP is unknown.

⁷⁵Officials also noted that the plan requires that any revenue paid to a record keeper, as well as any distribution or service fees and revenue sharing for sales fees paid to a record keeper, be reimbursed to the plan; amounts in excess of needs are distributed to participants.

⁷⁶As noted earlier, sponsors of ERISA plans generally must provide all participants with a series of disclosures including a summary plan description, pension benefit statements, and a summary annual report.

collect and make publicly available information on non-ERISA 403(b) investment option fees.⁷⁷ For example:

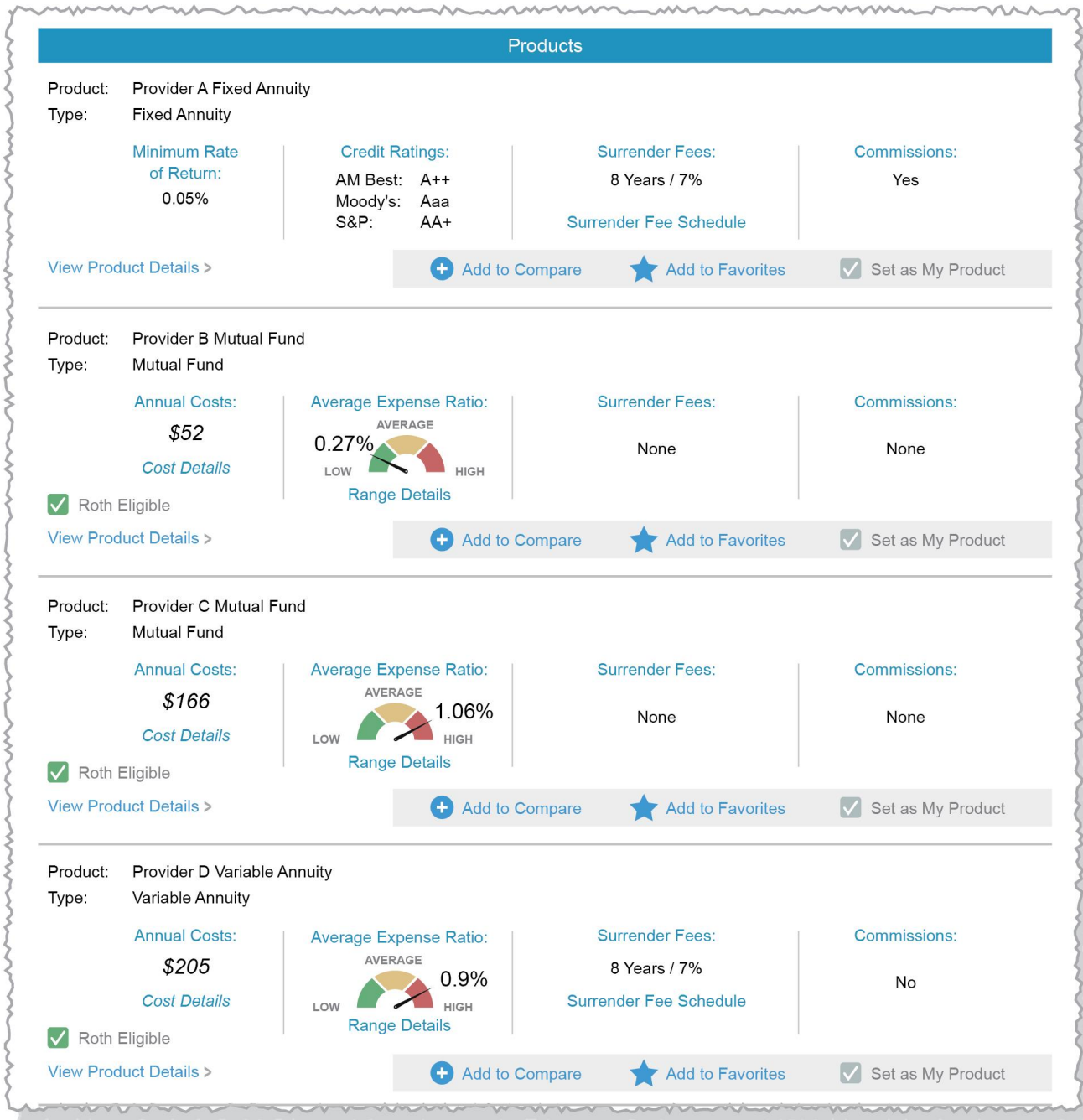
- California has developed a public website, 403bCompare.com, of free information about 403(b) vendors and the products offered. The website includes information for each investment option's annual administrative expenses, expense ratio,⁷⁸ and—for mutual funds and variable annuities—a measure that compares the relative cost of different investment options.⁷⁹ In July 2021, the website listed annual expense ratios ranging from 0.02 percent to 3.74 percent. Figure 8 presents a selection of comparative information from the website.

⁷⁷For Kansas, this refers to the plan provided for employees of the Kansas Board of Regents and educational institutions under the Board's management.

⁷⁸Individual investment options available to participants commonly express fees through an expense ratio, which are typically the largest fees borne by a participant. An expense ratio measures how much of a fund's assets are used for management, administrative, and other operating expenses charged by the fund manager and incurred by the fund. An expense ratio is a fund's operating expenses divided by the average dollar value of its assets under management. Operating expenses reduce the fund's assets, thereby reducing the return to investors.

⁷⁹California is an open-access state, and in October 2022, according to one expert, provided comparative information on 51 vendors offering 131 distinct products with over 10,000 investment options. Of those investment options, 43 percent are mutual funds, and 57 percent are annuity products, of which 21 percent are variable annuities, 18 percent are indexed annuities, and 18 percent are fixed annuities.

Figure 8: Selected Comparative Information Regarding 403(b) Investment Options Offered in California, as Detailed on Its Public Website



Source: GAO analysis of 403bCompare.com data. | GAO-23-105620

Accessible Data for Figure 8: Selected Comparative Information Regarding 403(b) Investment Options Offered in California, as Detailed on Its Public Website

Screenshot of website comparing four selected 403(b) investment options offered in California

Source: GAO analysis of 403bCompare.com data. | GAO-23-105620

Notes: Individual investment options available to participants commonly express fees through an expense ratio, which are typically the largest fees borne by a participant. An expense ratio measures how much of a fund's assets are used for management, administrative, and other operating expenses charged by the fund manager and incurred by the fund. An expense ratio is a fund's operating expenses divided by the average dollar value of its assets under management. Operating expenses reduce the fund's assets, thereby reducing the return to investors. A surrender fee is a fee for selling or withdrawing money from an investment within a set period of time—which can significantly lower a participant's account balance should the participant decide to deselect the annuity or investment option before the phase-out period is complete. Figure information is current as of February 2023.

As another example, the State of Connecticut Defined Contribution Plans publishes quarterly reports on its website that provide detailed information on its 403(b) plan's investment options' 1-year, 3-year, 5-year, and 10-year performance to date, along with the expense ratios of each of the investment options.⁸⁰

Information on Plan and Investment Fees Provided to Participants

Officials in four of the five selected states—California, Connecticut, Delaware, and Kansas—reported they enhanced transparency by distributing information on plan administrative and investment options' fees directly to participants or making it available online.⁸¹ For example, Delaware's contract with its service provider specifies that fee information will be provided to participants on a quarterly basis in their participant account statements. In addition, one of the Kansas Board of Regents plan's service providers provides quarterly fee reports to participants. These reports display information on the fees for each of the plan's investment options, shown as expense ratios, as well as the investment options' returns, as shown in figure 9. In addition, according to an official for this provider, the quarterly reports show fees assessed to a participant's account, along with transaction details and a description of any administrative or personalized service fees that apply to specific

⁸⁰A Connecticut official told us that the state has combined the assets for its 403(b), 457, and 401(a) plans to achieve efficiencies in plan administration and fees; therefore its quarterly report is applicable to all three of its defined contribution plans, including its 403(b) plan. For more information, see appendix II.

⁸¹California's information applies only to the statewide CalSTRS Pension2 plan. The practices of other plan sponsors in the state are generally unknown.

features and investments that a participant requests, such as a loan origination fee.⁸²

Figure 9: Example of Investment Options' Fee Information Provided to Non-ERISA 403(b) Plan Participants

The Kansas Board of Regents plan includes detailed information on investment options' expense ratios.

Fund Number	Investment Options	Gross / Net Fund Expense Ratio ^a	3-Mo	1-Yr	5-Yr	10-Yr/ Inception	Fund Inception Date
Bonds							
8320-Company A	<i>Intermediate Core Bond</i>	0.30%/0.30%	-5.56%	-12.26%	2.17%	1.27%	12/14/2012
D110-Company B	<i>Intermediate Core-Plus Bond</i>	0.03%/0.03%	-4.69%	-14.57%	-0.27%	0.85%	03/08/1990
544- Company C	Total Return Fund Inst.	0.47%/0.47%	-4.83%	-15.66%	-0.30%	1.06%	05/11/1987
Asset Allocation							
<i>Lifecycle - Index</i>							
1296-Company D	Target Retire 2022 Fund	0.08%/0.08%	-5.12%	-15.83%	2.91%	5.46%	06/07/2006
2473-Company D	Target Retire 2055 Fund	0.08%/0.08%	-6.63%	-20.17%	4.38%	7.58%	08/18/2010
Large Cap Growth							
<i>Large Growth</i>							
6779-Company E	Growth Fund Inst	0.70%/0.70%	-5.37%	-17.07%	13.26%	13.04%	02/03/1994
742-Company F	Large Cap Growth Port Inst	0.70%/0.67%	-2.57%	-26.49%	8.75%	11.47%	05/03/2004
Small/Mid/Specialty							
<i>Mid-Cap Blend</i>							
1197-Company D	Mid-Cap Index Fund Inst	0.04%/0.04%	-4.14%	-19.48%	6.66%	10.46%	05/21/1998
<i>Mid-Cap Growth</i>							
2766-Company G	Mid Cap Fund Inst	0.84%/0.84%	-4.26%	-26.95%	9.11%	12.14%	06/30/2008

Source: GAO analysis of Kansas Board of Regents participant statement. | GAO-23-105620

⁸²A Kansas Board of Regents official also stated the Voya quarterly statements provide the appropriate fee information, and participant fee disclosure statements are made available online each quarter, to comply with DOL's participant fee disclosure regulations, even though the plan is not an ERISA plan. Additionally, for the plan's other service provider, TIAA, participants are referred to the website (i.e., microsite and TIAA.org) rather than sending fee disclosures, as the Kansas Board of Regents plans are non-ERISA.

Accessible Data for Figure 9: Example of Investment Options' Fee Information Provided to Non-ERISA 403(b) Plan Participants

Excerpt from The Kansas Board of Regents plan highlighting Gross/Net Fund Expense ratios detailed in the plan.

Source: GAO analysis of Kansas Board of Regents participant statement. | GAO-23-105620

Notes: An expense ratio measures how much of a fund's assets are used for management, administrative, and other operating expenses charged by the fund manager and incurred by the fund. An expense ratio is a fund's operating expenses divided by the average dollar value of its assets under management. Operating expenses reduce the fund's assets, thereby reducing the return to investors.

Information on investment fees can be helpful to plan sponsors and participants because it enables them to make comparisons across similar investment options and determine if such fees are reasonable. For example, as we previously reported, a representative from a large 403(b) plan told us that information on investment fee expense ratios is a key factor in determining which investments their plan chooses to include to ensure that participants' savings are not eroded by high fees.⁸³

Several stakeholders have noted that it is challenging to educate participants about their 403(b) plan's investment options, including the options' fees. For example, at an October 2022 panel organized by the SEC, panelists noted that participants using California's 403bCompare website may still have to research investment options provided by dozens of providers. Each of these providers, in turn, may offer multiple investment options, which can result in a large number of options for a participant to compare. In addition, one panelist noted that certain fees for more complex investment options, such as variable annuities, can be difficult to identify. For example, this panelist stated, any surrender fee associated with a variable annuity investment option would not be included in the expense ratio fee.⁸⁴ This panelist further noted that, in addition to the expense ratio fee, the participant would need to identify multiple other fees to determine the total cost of the variable annuity investment, including an additional management fee and the mortality and expense charge; in one example, these additional fees would have added an additional 1.2 percent annual cost on top of the investment's 1 percent expense ratio.

⁸³[GAO-22-104439](#).

⁸⁴A surrender fee is a fee for selling or withdrawing money from an investment within a set period of time—which can significantly lower a participant's account balance should the participant decide to deselect the annuity or investment option before the phase-out period is complete.

Letter

Stakeholders and Experts Identified Multiple Options They Said Could Improve 403(b) Participant Outcomes

Stakeholders Suggested Enhancing Participant Protections and Standardizing Disclosures for Non-ERISA Plans, Among Other Options

Stakeholders and experts we interviewed identified multiple options that they said could potentially improve 403(b) participant outcomes. These options aim to enhance fiduciary protection for some participants in non-ERISA plans, better inform participants about the fees and expenses they are paying, provide plan participants with a means to access investment options with lower fees and expenses, or raise plan participation rates. Several of these options were also included in our surveys of 403(b) plan sponsors and service providers as described below.⁸⁵

Apply Additional Participant Protections to non-ERISA Plans

Multiple stakeholders we interviewed told us that applying additional participant protections such as fiduciary duties or best interest standards to non-ERISA 403(b) plans would help ensure that plan sponsors and service providers act in the best interest of plan participants.⁸⁶ State laws generally govern most aspects of non-ERISA 403(b) plans, and there is variation in state laws. In our March 2022 report, we estimated that non-ERISA plans contain about 43 percent of all 403(b) plan assets. While some of our selected case study states reported adopting fiduciary duties or best interest standards for non-ERISA 403(b) plans, others did not.

Stakeholders from participant advocacy groups and plan sponsors we spoke with also said that state laws often do not afford participants sufficient protections against paying excessive fees or being steered

⁸⁵For a complete list of the options discussed in our surveys, see appendix III.

⁸⁶In this report, when discussing experts and stakeholders, we use the term “several” to refer to three or four stakeholders we interviewed and the term “multiple” to refer to five or more stakeholders we interviewed. In our interviews with experts and stakeholders we asked open-ended questions to identify their suggestions for policy options. For more information on our methodology, see appendix I.

toward investment options that may not be in their best interest. One industry expert suggested that investment options in some 403(b) plans are often marketed at benefits fairs, fostering a retail atmosphere that may not lend itself to participants obtaining good information.⁸⁷

Attaching fiduciary responsibilities to plan sponsors or designees could improve participant outcomes by providing them access to investment options with better performance and reasonable fees, according to several stakeholders we interviewed. They said that fiduciary duties would require sponsors or designees to take a more active role in screening out service providers or investment options that under-perform or carry excessive fees.

Several stakeholders noted that when non-ERISA 403(b) plan sponsors are not subject to fiduciary responsibilities, individual participants are often left on their own to select from a large number of investment options. These options may include higher-cost products than are typically found in the ERISA 403(b) market. A National Bureau of Economic Research paper from 2019 found that broker-dealers selling annuities, a major component of many 403(b) plans, sold products with risk-adjusted returns that were 0.25 percent higher when they were subjected to fiduciary duties, and that clients had access to annuities with lower fees and higher investment quality ratings in such situations.⁸⁸

However, other stakeholders noted that some non-ERISA plan sponsors may not have the capacity to fulfill fiduciary duties. In particular, these stakeholders said that this role would be a challenge for K-12 school districts sponsoring 403(b) plans. Two stakeholders and one industry expert noted that, in many cases, elected school board members or office managers for school districts would likely lack the expertise to evaluate

⁸⁷We defined “stakeholders” as individuals or entities with knowledge in the subject matter but with a financial or advocacy interest in one or more aspects of 403(b) plans. Some of these stakeholders represented 403(b) plan sponsors, others represented service providers, while still others represented groups of participants. We defined “experts” as individuals or entities with knowledge in the subject matter but without a specific financial or advocacy stake, including academics who study the industry, state regulators (who are also not themselves sponsors of or service providers to 403(b) plans), and companies who furnish analysis of these plans to client but are not themselves involved in the industry directly. For more information, consult appendix I.

⁸⁸According to the research. See Vivek Bhattacharya, Gaston Illanes, and Manisha Padi, *Fiduciary Duty and the Market for Financial Advice* (National Bureau of Economic Research, Cambridge, Mass.: May 2019).

service providers, fees, or investment options on their own. Furthermore, several stakeholders also said that non-ERISA plan sponsors assuming fiduciary duty could put them at risk of lawsuits.⁸⁹

Several stakeholders noted that the lack of a fiduciary duty or other requirements to operate in the best interest of participants can result in conflicts of interest among administrators or service providers and operate to the detriment of plan participants. For example, stakeholders told us that plan administrators may fail to disclose relationships they have with service providers. If plan administrators receive a portion of those fees, they may have a financial incentive for plan participants to pay higher fees. A 2020 National Bureau of Economic Research paper found that sales of variable annuities—a major component of many 403(b) plans—are nearly four times as sensitive to the financial interests of brokers as those of investors, while finding a strong positive correlation between the expenses associated with a variable annuity and commission rates for brokers.⁹⁰

As described earlier, the SEC has identified instances of undisclosed conflicts of interest related to non-ERISA 403(b) plans. For example, in July 2020, the SEC found that a vendor of annuity products failed to disclose conflicts of interest to K-12 teachers participating in 403(b) and other defined contribution retirement plans in Florida. These plans generated millions of dollars of fees and other financial benefits to the vendor and companies affiliated with that vendor.

Annuity products are commonly offered in 403(b) plans. The National Association of Insurance Commissioners has made efforts to help states establish best interest standards and ensure uniform disclosure

⁸⁹As discussed below, ERISA 403(b) plans have been the subject of recent lawsuits.

⁹⁰According to the research, a 1 percentage point increase in broker commissions for the sale of a variable annuity is associated with an 18 percent increase of the sales of the annuity while a one percentage decrease in the net present value of future expenses is associated with a 4.9 percent increase in sales of that annuity. See Mark L. Egan, Shan Ge, and Johnny Tang, *Conflicting Interests and the Effect of Fiduciary Duty – Evidence from Variable Annuities* (revised) (Cambridge, Mass.: National Bureau of Economic Research, November 2021).

requirements; however, these efforts do not apply to annuities purchased in connection with 403(b) plans, as described in the text box.⁹¹

Participant Protections for Certain Annuity Investment Options in 403(b) Portfolios May Vary

Participant protections for different annuity investment options vary because some annuities are covered by federal securities laws and others are subject to state laws and regulations, which may vary.

Fixed annuities and most indexed annuities are chiefly regulated by state insurance commissions, and state laws covering annuities vary. The National Association of Insurance Commissioners (NAIC) has issued model regulations intended to harmonize regulations for annuities across states that elect to adopt these regulations.

- If adopted by a state, NAIC's Annuity Disclosure Model Regulation (MDL-245, 2015) requires insurers of annuities to provide, among other things, contact information, a description of the contract and its benefits, and any applicable surrender charges. A surrender charge is a fee charged for selling or withdrawing money from an investment within a set period of time, often phased out over a number of years.
- If adopted by a state, NAIC's Suitability in Annuity Transactions Model Regulation (MDL-275, 2020) requires, among other things, insurers to maintain a supervisory system to ensure that they act in the best interest of consumers when making recommendations to purchase annuities, specifies obligations of reasonable care, and requires a description of the scope of the relationship between the insurer and the purchaser, and disclosure of any potentially material conflicts of interest.

However, NAIC officials stated that both of these model regulations exclude any annuities purchased in connection with 403(b) plans. According to these officials, annuities offered through 403(b) plans were excluded from the model regulations because they are classified as employer-sponsored plans, even though several experts and stakeholders told us that it was common for vendors of annuities to market them directly to 403(b) participants.

Source: GAO review of Securities and Exchange Commission, Financial Industry Regulatory Authority, and NAIC documentation, and GAO interviews with NAIC officials. | GAO-23-105620

Several industry stakeholders suggested applying best interest standards to transactions that are not specifically covered by Regulation Best Interest. For example, one industry representative suggested that some large vendors often apply the same protocols required by Regulation Best Interest to transactions with retail 403(b) participants regardless of whether the regulation specifically applies to those transactions because it is easier to give participants standardized advice; this in effect defaults to what this representative characterized as the more rigorous Regulation Best Interest standard.

⁹¹Generally, variable annuities are regulated by the SEC and FINRA as securities, meaning that they have prospectus disclosure requirements, and the broker-dealers who recommend them to retail customers are subject to the standards of Regulation Best Interest, and other FINRA rules.

Standardize Disclosures to Increase Transparency of Information on Fees and Investment Options for Non-ERISA Plans

Multiple stakeholders noted that requiring plan sponsors and service providers to provide standardized information on investment options' fees and returns to non-ERISA 403(b) plan participants would increase transparency. In particular, several stakeholders said that, in their view, some participants in non-ERISA 403(b) plans did not receive sufficient disclosures that would enable them to make informed investment decisions.

In addition, efforts to promote transparency of fees at the plan and investment level were two of the most frequently cited options supported by 403(b) plan sponsors who responded to our survey.⁹² Specifically, 13 of 25 plan sponsors and seven of 21 service providers reported that they were in favor of federal agencies promoting transparency of plan-level fees or charges. Eleven of 26 plan sponsors and six of 21 service providers reported that they were in favor of federal agencies promoting transparency of investment-level fees or charges.⁹³

To increase transparency, multiple stakeholders suggested that participants in non-ERISA 403(b) plans should receive disclosures or participant statements similar to those required by ERISA with respect to fees and expenses. They said that such disclosures could include, for example, a summary table comparing the plan's investment options and expense information regarding those options as well as an accounting of fees charged by record keepers and other service providers.

Multiple stakeholders we interviewed noted that standardized disclosures for non-ERISA 403(b) plans would simplify the administration of these plans and allow participants to more easily compare investment options, which could lower fees. According to two large service providers, the variation across state disclosure requirements has resulted in an unwieldy and burdensome administration of those accounts. To reduce administrative complexity, they suggested harmonizing disclosure

⁹²Plan-level expenses include fees for recordkeeping and administrative services, investment consulting fees, and legal and audit fees. Investment-level expenses include investment management fees, marketing and distribution fees, and trading or transaction costs.

⁹³For these and the results detailing other measures identified by our survey of 403(b) plan sponsors and participants as helpful in enhancing protections for 403(b) participants, see appendix III.

requirements for non-ERISA 403(b) plans at the federal level. For example, one industry expert we interviewed said that standardized disclosure requirements would allow participants to more easily compare providers or investment options and would help accelerate changes that would lower fees. Another industry expert suggested that a standardized text box that summarizes fee information, similar to what appears in consumer credit card statements, would be helpful to 403(b) participants when they compare the fee structures of different providers or learn which types of services they were receiving accounted for the largest share of the fees they were paying. As our prior work has shown, seemingly small fees, such as a 1 percent annual charge, can significantly reduce plan participants' retirement savings, even as investment returns may grow the savings overall.⁹⁴

Expand Investment Option Types to Include Collective Investment Trusts

Multiple stakeholders we interviewed said that 403(b) plans should be allowed to contain a broader range of investment options, either to facilitate more diversified portfolios for participants or to lower fees and expenses. Investment options available to 403(b) plans are generally more limited than 401(k) plans. Specifically, 403(b) plans are generally only allowed to invest in annuities and regulated investment company stock (or mutual funds) held in custodial accounts. In contrast, 401(k) plans can offer a wider range of investment products, such as collective investment trusts (CIT) and real estate investment trusts. Recently, Congress enacted legislation that changed the IRC in such a way to facilitate greater inclusion of CITs in 403(b) plans, but additional changes to federal securities laws—specifically, those that require certain 403(b) plan investments to be registered as securities—would still need to be

⁹⁴For examples of prior work, see [GAO-22-104439](#) and GAO, *Private Pensions: Changes Needed to Provide 401(k) Plan Participants and the Department of Labor Better Information on Fees*, [GAO-07-21](#) (Washington, D.C.: Nov. 16, 2006).

amended for 403(b) plans to allow CITs in a manner consistent with the recently enacted legislation.⁹⁵

CITs were commonly cited by both stakeholders we spoke with and survey respondents as being helpful for inclusion in 403(b) plans.⁹⁶ Specifically, 22 of 46 respondents (10 of 25 plan sponsors and 12 of 21 service providers) expressed an interest in increased flexibility to include CITs among the available investment options. According to research from Morningstar, CITs have substantially lower fees than mutual funds.⁹⁷ Morningstar's research found that the average asset-weighted expense ratio for actively managed CITs was 0.369 percent when compared with a 0.647 percent ratio for actively managed mutual funds. Similarly, it reported that passively managed CITs had a 0.048 percent expense ratio versus a 0.077 expense ratio for passively managed mutual funds, and overall it found that CITs carried lower expenses than mutual funds that employed the same investment strategy about 91 percent of the time.⁹⁸ According to participants in an industry panel, CITs can also carry tax advantages when investing in international assets versus mutual funds. According to one industry source, defined contribution retirement plans, mostly 401(k) plans, hold a total of about \$3 trillion worth of assets in CITs.

⁹⁵Section 128 of SECURE 2.0 Act of 2022 (SECURE 2.0) amended the IRS's Internal Revenue Code (IRC) to allow 403(b)(7) plans greater flexibility in investing in CITs, effective Jan. 1, 2023. However, Section 128 of SECURE 2.0, as enacted, did not, simultaneously, amend the Securities Act of 1933 (specifically, Section 3(a)(2)), the Securities Exchange Act of 1934 (specifically, Section 3(a)(12)(C)) and The Investment Company Act of 1940 (specifically, Section 3(c)(11)), to allow 403(b)s to have CITs. See 26 U.S.C. § 403(b)(7).

⁹⁶CITs, also sometimes known as Collective Investment Funds, are pooled investment vehicles organized as trusts administered by a bank that holds co-mingled assets established under a plan that details the terms of asset management. They are designed to enhanced investment management by combining assets from different accounts into a single fund with a specific investment strategy; they may lower operational and administrative expenses associated with investing fiduciary assets. CITs sponsored by national banks are regulated by the Office of the Comptroller of the Currency, part of the Department of the Treasury.

⁹⁷Morningstar, *CITs: A Welcome Addition to 403(b) Plans* (Chicago, Ill.: June 2020).

⁹⁸Passively managed mutual funds, such as index funds, aim to maximize returns over the long run by buying and selling securities less often. By contrast, actively managed funds often seek to outperform a benchmark (usually measured by an index) by doing more frequently sales and purchases of securities.

However, one stakeholder and an industry expert expressed concerns about CITs. Specifically, a stakeholder representing participant groups noted that CITs are less regulated than mutual funds and less transparent in their operations and therefore more difficult to research for retail investors. Similarly, an industry expert noted that CITs did not have to publicly disclose information about fees or expenses, although this expert acknowledged that their fees are generally lower than those of mutual funds. In addition, according to an industry report, defined contribution plan participants with assets invested in CITs may have to liquidate their holdings to roll over those assets into holdings allowed in an individual account such as an IRA when changing employers.⁹⁹

Conduct Outreach to Plan Sponsors

Several stakeholders told us that federal agencies are missing opportunities to provide additional outreach to plan sponsors, particularly smaller plan sponsors. Such outreach could help plan sponsors better administer their 403(b) plans and understand the rules that govern those plans. For example, one stakeholder representing participants said small K-12 school districts or other small 403(b) plan sponsors could benefit from information about managing their plans and informing their participants about various investment options. These stakeholder observations are similar to what some K-12 school district 403(b) plan sponsors had reported in our prior work about being unaware of investment options or fees for their plans.¹⁰⁰

Many of our survey respondents indicated that federal agencies could provide additional information in materials such as model plan documents, checklists, or additional information about the applicability of ERISA to certain 403(b) plans.¹⁰¹ As noted earlier, DOL's website

⁹⁹BenefitsPro, *Collective Investment Trust Considerations for Plan Sponsors* (March 2022).

¹⁰⁰[GAO-22-104439](#).

¹⁰¹Specifically, 14 of 46 respondents, including five of 25 plan sponsors and nine of 21 service providers, reported being in favor of agencies furnishing additional information, or providing clarity or outreach regarding whether ERISA applies to certain 403(b) plans. In addition, 19 of 45 respondents—including nine of 25 plan sponsors and 10 of 21 service providers—responded that federal agencies could provide additional informational materials, such as model plan documents or checklists, for 403(b) plans. For these and the results detailing other measures identified by our survey of 403(b) plan sponsors and participants as helpful in enhancing protections for 403(b) participants, see appendix III.

provides certain materials designed to help 401(k) plan sponsors, such as the Understanding Retirement Plan Fees and Expenses document for 401(k) fees that could help sponsors understand fees, which could also be relevant to 403(b) plan sponsors.¹⁰² As part of this effort, two stakeholders and one industry expert stated that some plan sponsors would be interested in learning from federal agencies, whether or not those agencies had a direct regulatory role in their plans and whether the practices were tied to ERISA compliance. Another stakeholder suggested that guidance on new regulations specify whether the new regulation applies only to ERISA 403(b) plans or to both ERISA and non-ERISA plans.

Allow for Automatic Enrollment and Automatic Escalation for Non-ERISA 403(b) Plans

A majority of respondents to our survey of 403(b) plan sponsors and service providers said that expanding the use of automatic enrollment and automatic escalation features in 403(b) plans could improve participant outcomes; several stakeholders we interviewed cited the value of automatic enrollment in particular. Allowing these non-ERISA plans to use both automatic enrollment and automatic escalation were the two most frequently cited options to improve participant outcomes by our survey respondents.¹⁰³

While automatic enrollment and auto escalation are widely used by 401(k) plans, some states prohibit the use of these features in non-ERISA 403(b) plans.¹⁰⁴ Specifically, according to two industry stakeholders we

¹⁰²See <https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/publications/understanding-retirement-plan-fees-and-expenses.pdf>.

¹⁰³Specifically, 26 of 46 respondents (12 of 25 plan sponsors, and 14 of 21 service providers) reported being in favor of flexibility to allow for auto-enrollment in 403(b) plans where auto-enrollment reportedly is not currently permitted. Meanwhile, 24 of 46 respondents (11 of 26 plan sponsors and 13 of 21 service providers) reported being in favor of allowing automatic escalation of 403(b) plan contributions.

¹⁰⁴According to a study by the Plan Sponsor Council of America, about 60 percent of 401(k) plans used automatic enrollment in 2019 compared with 24.4 percent for 403(b) plans. These data cover both ERISA and non-ERISA 403(b) plans. Plan Sponsor Council of America, *2020 403(b) Plan Survey, Reflecting 2019 Plan Experience* (2020: Arlington, Va.) and *63rd Annual Survey: PSCA's Annual Survey of Profit Sharing and 401(k) Plans, Reflecting 2019 Plan Experience* (2020: Arlington, Va.).

interviewed, as well as an industry report,¹⁰⁵ laws governing wage garnishment in several states generally limit or prohibit automatic enrollment for certain non-ERISA 403(b) plans.¹⁰⁶ In contrast to some non-ERISA 403(b) plans, 403(b) plans and other defined contribution plans subject to ERISA are allowed to use automatic enrollment and automatic escalation under federal law. Research by one of the largest 403(b) service providers has shown that the adoption of automatic enrollment results in a substantial increase in the proportion of employees participating in retirement saving plans, and that automatic enrollment combined with automatic escalation leads to increased savings when compared with automatic enrollment alone.¹⁰⁷ Stakeholders we interviewed agreed that automatic enrollment would lead to increased participation rates.¹⁰⁸

¹⁰⁵National Tax-Deferred Savings Association, *NTSA The Source: For 403(b) and 457(b) Plans*, 8th ed. (Arlington, VA: 2020).

¹⁰⁶According to the IRS, there may be some situations where non-ERISA plans sponsored by churches and organizations controlled by or associated with churches are permitted to apply automatic contribution arrangements for its employees. See Pub. L. No. 114-113 § 336(c), 129 Stat. 2242, 3110-12 (2015).

¹⁰⁷A 2021 study by Vanguard Research indicates that participation rates in defined contribution plans that used automatic enrollment were 91 percent, compared with 28 percent for defined contribution plans where enrollment was voluntary. Vanguard Research, *Automatic Enrollment: The Power of the Default* (February 2021), accessed November 16, 2022. A different Vanguard Research study showed that the median deferral level for eligible employees (including nonparticipants) in plans that had automatic escalation was 8.0 percent compared with 7.0 percent for plans with automatic enrollment but voluntary escalation and 6.0 percent for eligible employees in plans with only voluntary enrollment. See Vanguard Research, *Automatic Escalation and DC Savings Rates* (October 2021), accessed April 6, 2023, <https://institutional.vanguard.com/insights-and-research/perspective/automatic-escalation-and-dc-saving-rates.html>. For more information about the effects of automatic enrollment on participation in defined contribution retirement plans in some other countries, see GAO, *Retirement Security: Recent Efforts by Other Countries to Expand Plan Coverage and Facilitate Savings*, [GAO-22-105102](https://www.gao.gov/products/GAO-22-105102) (Washington, D.C.: August 2022).

¹⁰⁸In 2022 SECURE 2.0 was enacted, requiring certain new 403(b) plans to meet automatic enrollment requirements for plan years beginning after December 31, 2024. Pub. L. No. 117-328, div. T, § 101(a) 136 Stat. 4459, 5275-77. However, these requirements do not apply to governmental or church plans, among others.

Some 403(b) Plan Sponsors Have Agreed to Take Certain Actions to Lower Fees and Address Other Participant Concerns

In addition to options identified by stakeholders and experts we interviewed, we also found, by looking at settlement agreements, examples of actions that 403(b) plan sponsors agreed to undertake to address concerns raised by 403(b) participants. In these settled cases, plan participant plaintiffs alleged that plan sponsors breached their fiduciary obligations, resulting in, among other things, excessive fees or charges to administer the plan, or offering investment options that either performed poorly or charged excessive fees to participants.¹⁰⁹ We reviewed a total of 18 settlement agreements from 2015 through 2022 involving ERISA-covered plan participants, of which 13 provided for one or more actions that plan sponsors agreed to take to address participant concerns in addition to monetary awards.¹¹⁰

Table 3 indicates settlement agreements we reviewed that contain nonmonetary terms. Other nonmonetary provisions included provisions concerning frozen assets and revenue sharing.¹¹¹

¹⁰⁹Because the nature of a settlement agreement depends on the specific facts and circumstances involved in a dispute, the results of our review of these settlement agreements are not generalizable. In order to identify 403(b) cases for our analysis, we interviewed a representative of a law firm who has served as plaintiff's counsel for several 403(b) cases, who provided us with some settlement agreements, did internet searches for 403(b)-related litigation, and searched a legal database for litigation involving 403(b) plans, looking specifically for cases that were settled, or where a judgment was entered between 2015 and 2022. For more information about how we searched and selected these cases, see appendix I.

¹¹⁰All 18 of those settlements included monetary awards ranging from \$225,000 to \$32,000,000. None of the settlement agreements we reviewed contained admissions of liability or wrongdoing by the parties. Five of those 18 settlements were settled on wholly monetary terms; four of the five were plans involving health care workers and the fifth involved higher education workers. We focused our review on the 13 settlements containing one or more nonmonetary terms for our subsequent analysis.

¹¹¹"Frozen assets" in this context refers to investment options that are no longer open to new contributions by participants, possibly because one or more investment providers has been de-selected by the plan sponsor. Revenue sharing generally refers to indirect payments made from one service provider to another service provider in connection with services provided to the plan, rather than payments made directly by the plan sponsor for plan services.

Table 3: Summary of Selected Terms Included in 13 Settlements Agreements from 2015 through 2022 Involving 403(b) Plan Sponsors

Plan sponsor type (year of settlement)	Agreement to use request for proposal to select providers	Agreement to use consultant to manage fees or investment options	Agreement to offer lower-fee products	Agreement to seek flat recordkeeping fee	Agreement to prohibit cross-marketing	Other ^a
Health Care #1 (2015)	contains	contains	contains	contains	does not contain	does not contain
Higher Education #1 (2019)	contains	contains	contains	does not contain	does not contain	contains
Higher Education #2 (2019)	contains	does not contain	does not contain	does not contain	does not contain	does not contain
Higher Education #3 (2019)	contains	contains	contains	contains	contains	contains
Higher Education #4 (2019)	contains	contains	contains	contains	contains	contains
Higher Education #5 (2019)	contains	contains	does not contain	contains	does not contain	contains
Higher Education #6 (2020)	contains	contains	contains	contains	contains	contains
Higher Education #7 (2020)	contains	contains	contains	does not contain	does not contain	does not contain
Higher Education #8 (2021)	contains	does not contain	contains	contains	contains	contains
Health Care #2 (2021)	contains	contains	does not contain	does not contain	does not contain	does not contain
Higher Education #9 (2021)	contains	contains	contains	contains	contains	contains
Higher Education #10 (2021)	contains	does not contain	does not contain	does not contain	does not contain	does not contain
Higher Education #11 (2022)	contains	contains	does not contain	does not contain	contains	does not contain

Legend:

- Contains
- Does Not Contain

Source: GAO Analysis of Selected Settlement Agreements involving 403(b) Plans. | GAO-23-105620

Notes: We examined a total of 18 settlement agreements; five of the 18 settlement agreements we analyzed contained only monetary settlement terms, and we excluded them from this table. Four of those five settlements involved health care workers and the fifth involved higher education workers. Because the nature of a settlement agreement depends on the specific facts and circumstances involved in a dispute, the results of our review of these settlement agreements are not generalizable.

^aOther provisions included in nonmonetary settlement agreements pertain to restrictions on the use of revenue sharing and the disposition of frozen assets.

As shown in table 3, we examined five specific types of nonmonetary actions that plan sponsors agreed to take in the settlement agreements. Specifically:

Using request for proposal (RFP) process to select service providers. Plan sponsors in all 13 of the settlement agreements we reviewed agreed to use an RFP process to select service providers for the plan.¹¹² In some cases these terms specified a minimum number of providers—often at least three—that are required to be considered as part of that process.

Two stakeholders we interviewed told us that an RFP process can offer a level playing field between potential vendors with reduced opportunities for bias or favoritism. They said the process can also focus the vendor selection process on an agreed-upon set of criteria, such as lower fees.

Using consultants to manage fees or investment options. Plan sponsors in 10 of the 13 settlement agreements we reviewed agreed to use independent consultants to monitor one or more aspects of the plan. Specifically, the plan sponsors agreed to use consultants to help manage one or more of the following: the plan’s menu of investment options; the plan’s roster of service providers; or the fees the plan pays to those service providers. In some cases, the settlement indicated that the plan sponsor already retained a consultant and pledged to continue using either that consultant’s services or those of another consultant.

Several stakeholders we interviewed expressed concerns that some 403(b) plan sponsors did not have enough knowledge of the retirement plan industry to prudently manage these plans or their investment options without hiring outside help. Further, as mentioned above, some of the plan sponsors who responded to our survey reported not being aware of investment options available in their plan. These stakeholders told us that consultants could help plan sponsors investigate and pursue opportunities to reduce plan costs, such as accessing different investment options that carry lower fees, as discussed below.

Revising plan’s investment offerings to include lower fee options. Plan sponsors in eight of the 13 settlement agreements we reviewed

¹¹²According to stakeholders with whom we spoke, plan sponsors that use an RFP process generally consider competitive bids from service providers based on service levels, fees, types of investments available, or promised investment returns.

agreed to examine the plan's current menu of investment options and, if feasible, offer investment options that had lower fees and expenses associated with them. Such changes included, for example, offering share classes that are lower cost among the investment options.¹¹³ One of the settlement agreements specified that the plan fiduciaries should consider including CITs, to the extent they are permitted, for inclusion among the plan's investment options.

Charging flat fees for recordkeeping services. Plan sponsors in seven of the 13 settlement agreements we reviewed included a provision that any contract for recordkeeping services charge a flat per-participant fee rather than an asset-based fee that increases with the amount of one's account balance.¹¹⁴ According to one stakeholder representing 403(b) participants that we interviewed, the costs associated with recordkeeping do not necessarily scale up with the amount of assets in the plan. This stakeholder explained that, as a result, asset-based charges can lead to recordkeeping fees for large accounts that are high relative to the cost of providing those services. An industry report indicates that the trend in defined contribution retirement plans as far back as 2015 has been moving away from asset-based recordkeeping fees.¹¹⁵

Limiting cross-marketing of other products or services. Plan sponsors in six of the 13 settlement agreements we reviewed agreed to include a requirement in contracts with service providers that limits or restricts their use of participant data to market another investment or

¹¹³These changes could include offering institutional-grade mutual funds instead of retail-grade mutual funds. Institutional-grade mutual funds typically contain shares of securities in classes available only to institutional, as opposed to individual, or retail investors and generally require a large minimum investment. Institutional share classes typically have lower expense ratios than other kinds of shares. As such, institutional-grade mutual funds will generally have lower expense ratios than retail-grade mutual funds. Similarly, the plan could include more passively managed mutual funds, which tend to have lower fees than more actively managed funds. Passively managed mutual funds are structured to replicate a given index, such as the Standard & Poor's 500 or Russell 2000, and its performance, and managers do not actively pick stocks or make buying selling decisions. Managers of actively managed funds conduct research and may engage in market timing in an attempt to outperform such indices.

¹¹⁴Our review of selected states found that Kansas has implemented some per-participant fee structures.

¹¹⁵NEPC, *NEPC 2015 Defined Contribution Plan and Fee Survey: What a Difference a Decade Makes* (Boston, Mass.: October 2015).

insurance product or service unrelated to the plan.¹¹⁶ Some of these agreements specified IRAs, life or disability insurance, and wealth management services as products that service providers might sell or market to plan participants. According to one stakeholder we interviewed, service providers sometimes gain access to data regarding a participant's investment history or major life events and use those data as part of an attempt to sell other products to those customers.

Conclusions

DOL is one of several federal agencies that provides oversight and guidance—including educational materials—for 403(b) retirement plans. Collectively, 403(b) plans hold more than \$1 trillion in assets. DOL's role focuses only on plans covered by ERISA, which amounted to more than \$600 billion in assets as of 2019. DOL provides guidance and educational materials that help 401(k) plan sponsors and participants make informed decisions. However, DOL does not provide the same level of detailed information regarding 403(b) plans as it does for 401(k) plans. For example, the primary resource DOL provides to help participants understand their fees does not reference 403(b) plans. As our prior work has shown, seemingly small fees, such as a 1 percent annual charge, can significantly reduce plan participants' retirement savings, even as investment returns may grow the savings overall. In addition, guides DOL has posted to the 401(k) portion of its website to help plan sponsors understand their fiduciary responsibilities and disclosure requirements could also be beneficial to 403(b) plan sponsors. DOL could better ensure that 403(b) plan sponsors and participants have the information they need to make better management and investment decisions regarding their plans by providing materials comparable to those posted on its 401(k) website. Updating DOL's educational materials with information relevant to 403(b) plans would help ERISA 403(b) plan sponsors and participants

¹¹⁶These practices have also attracted regulatory scrutiny. For example, one service provider agreed to pay nearly \$100 million in restitution to retirement plan participants for misleading those participants into moving money from their employer-sponsored retirement accounts, including 403(b) accounts, into higher-fee accounts offered by the service provider, following investigations by the SEC and the New York Office of the Attorney General. According to the SEC, the provider did not adequately disclose the full nature and extent of their conflicts of interest when it recommended that a client roll over retirement assets. See <https://www.sec.gov/news/press-release/2021-123> for more information.

understand and evaluate fees and expenses in those plans, and select a 403(b) investment option that meets their financial goals.

Recommendation for Executive Action

The Secretary of Labor should update educational materials provided on the agency's 403(b) website to ensure these materials include information relevant to 403(b) plans for plan sponsors and participants. For example, these updates could include adding information with direct references to 403(b) plans to help participants understand their 403(b) plan fees. (Recommendation 1)

Agency Comments

We provided a draft of this report to the Department of Labor (DOL); the Securities and Exchange Commission (SEC), and the Department of the Treasury (Treasury), including the Internal Revenue Service (IRS). DOL provided formal comments on the draft report.

In its comments, reproduced as appendix IV, DOL neither agreed nor disagreed with our recommendation. In addition, DOL noted it has a webpage dedicated to 403(b) plan issues and noted that the information in its 401(k) publications could be helpful to ERISA-covered 403(b) plan sponsors, participants and other interested parties evaluating fees and expenses in those plans. DOL stated that the agency's rule applicable to participant-directed individual account plans, which requires disclosure of certain plan and investment-related information including a comparative chart or similar format designed to facilitate a comparison of each investment option available under the plan, applies to ERISA-covered 403(b) plans as well as 401(k) plans. The agency stated that in accordance with our recommendation, it would review the relevant publications with an eye to seeing whether the agency should be more specific about referencing 403(b) plans.

In addition, DOL, SEC, and IRS provided technical comments, which we incorporated as appropriate.¹¹⁷

¹¹⁷We also provided the Financial Industry Regulatory Authority, Inc. (FINRA) a copy of the draft report for technical comments, and it provided technical comments, which we incorporated as appropriate.

As agreed with your office, unless you publicly announce the contents of this report earlier, we plan no further distribution until 30 days from the report date. At that time, we will send copies to the appropriate congressional committees, the Secretary of Labor, the Chair of the Securities and Exchange Commission, the Commissioner of Internal Revenue, and other interested parties. In addition, the report will be available at no charge on the GAO website at <https://www.gao.gov>.

If you or your staff have any questions about this report, please contact us at (202) 512-7215 or nguyentt@gao.gov. Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this report. GAO staff who made key contributions to this report are listed in appendix V.

Sincerely yours,

A handwritten signature in cursive script that reads "Kris Nguyen".

Tranchau (Kris) Nguyen, Director
Education, Workforce, and Income Security Issues

Appendix I: Objectives, Scope, and Methodology

This report examines (1) the extent to which federal agencies conduct oversight of 403(b) plans, (2) actions selected states have undertaken that could improve 403(b) participant outcomes, and (3) options stakeholders and experts have identified that could improve outcomes for 403(b) participants.

Methodology to Assess Federal Agencies' Efforts to Conduct Oversight of 403(b) Plans

To assess the extent to which federal agencies conduct oversight of 403(b) plans, we obtained and analyzed federal agency information on the number and types of violations relevant to 403(b) plans and service providers, investment vendors, broker dealers, or other service providers for 403(b) plans from the Department of Labor (DOL), the Securities and Exchange Commission (SEC), and the Internal Revenue Service (IRS), as well as from the self-regulatory organization, the Financial Industry Regulatory Authority, Inc. (FINRA). We reviewed relevant federal laws and regulations that pertain to the administration and oversight of 403(b) plans, including those pertaining to the sales of the types of investment options included in 403(b) plans.¹ We examined disclosure requirements for ERISA and non-ERISA plans and other sources of fee information including the prospectuses for variable annuities and mutual funds that may comprise 403(b) plan investment options. We also interviewed agency officials regarding their oversight activities.

To determine the extent of DOL's monitoring and enforcement of 403(b) plans, we reviewed enforcement data from DOL's Employee Benefits Security Administration (EBSA) from fiscal years 2010 through 2021—the most recent year for which data are available—regarding DOL's investigations of ERISA 403(b) plans. We also determined the share of

¹See, e.g., 17 C.F.R. § 240.15l-1; 29 C.F.R. § 2550.404a-5.

DOL investigations that met DOL’s criteria for being a major case,² from fiscal years 2010 through 2021, the most recent year for which these data are available, by comparing DOL case information by plan size with GAO’s tabulation of assets in the plan size category for calendar year 2019, using 2019 Form 5500 data.

We also obtained and analyzed available data and information regarding enforcement activities from other federal agencies and a regulator. More specifically, from the IRS, we obtained and analyzed data including those from examinations involving 403(b) plans from fiscal years 2011 through 2020—the most recent year for which data were available—identifying the most common types of violations it identified for 403(b) plans. From the SEC, we reviewed public information regarding outcomes from examinations involving providers of 403(b) plans.³ From FINRA, we obtained and analyzed data including a summary provided by FINRA of disciplinary actions that mention 403(b) plans from 2005 through May 2022.⁴

To ensure the DOL, FINRA, and IRS data we used were reliable, we reviewed technical documentation and contacted knowledgeable officials and regulators with specific questions about the data. We determined that the data were sufficiently reliable for the purposes of reporting on the

²DOL has identified major cases as those that result in a loss recovery plan of \$5 million or more; payments to plan participants totaling \$1 million or more; and for defined contribution plans with 100–250 participants, a recovery of 10 percent of plan assets (recovery is at least \$500,000), among other conditions. DOL officials said that other criteria besides the described participant and asset thresholds could constitute a major case.

³SEC officials said the agency generally does not collect data to determine or identify whether 403(b) investment options or service providers were involved in any specific SEC examination. As such, we excluded the SEC from our data reliability checks.

⁴These data are FINRA-compiled summary data provided to GAO in May 2022 that FINRA representatives stated were those cases that mentioned 403(b) plans from 2005 onward from FINRA’s publicly available enforcement database. GAO pulled its own data for 2005 onward from FINRA’s public database and identified 32 documents that mentioned 403(b) plans from January 2005 through December 2022. According to FINRA representatives, there are more entries in the FINRA database than the number of cases because a few cases have more than one related document (e.g., Complaint and Offer of Settlement or Decision) in the database.

number of investigations and outcomes of enforcement actions involving ERISA 403(b) retirement plans.⁵

To determine what is known about the use of the Limited Employer Involvement safe harbor (safe harbor) exemption by nongovernmental tax-exempt 403(b) plans, we reviewed relevant federal regulations and guidance regarding the Limited Employer Involvement safe harbor.⁶ We interviewed DOL officials regarding their oversight efforts for the safe harbor for 403(b) plans and reviewed relevant previous GAO work that discussed 403(b) plans.⁷

To examine guidance and outreach provided by federal agencies related to 403(b) plans, we reviewed relevant materials from DOL, SEC, IRS, and FINRA, such as checklists, guidance documents, and other types of outreach to 403(b) plan sponsors and participants. We also interviewed agency officials regarding their efforts to provide outreach to plan sponsors, participants, and the public. We assessed agencies' enforcement and outreach and public information against federal internal control standards.⁸

⁵With respect to GAO's tabulation of assets in ERISA 403(b) plans in fiscal year 2019 to determine approximate DOL major case thresholds, we performed a data reliability assessment of the Form 5500 variables we included in our analyses. We reviewed technical documentation, conducted electronic data tests for completeness and accuracy, and contacted knowledgeable officials with specific questions about the data. We determined that the data we used were sufficiently reliable for this purpose. According to SEC officials, the agency completes about 3,000 examinations each year, and many of these examinations involve investment products included in 403(b) plan accounts. SEC officials said the agency generally does not collect data to determine or identify whether 403(b) investment options or service providers were involved in any specific SEC examination. As such, we excluded the SEC from our data reliability checks.

⁶See 29 C.F.R. § 2510.3-2(f); see also Department of Labor Field Assistance Bulletin 2007-02 (July 24, 2007).

⁷In particular, see GAO, *Defined Contribution Plans: 403(b) Investment Options, Fees, and Other Characteristics Varied*, [GAO-22-104439](#) (Washington, D.C.: Mar. 4, 2022); and *Retirement Savings: Better Information and Sponsor Guidance Could Improve Oversight and Reduce Fees for Participants*, [GAO-09-641](#) (Washington, D.C.: Sept. 4, 2009).

⁸See GAO, *Standards for Internal Control in the Federal Government*, [GAO-14-704G](#) (Washington, D.C.: September 2014). We assessed DOL's informational materials against internal control principles 13.01 and 15.01.

Methodology to Describe State Actions that Could Improve Participant Outcomes

To describe actions selected states have undertaken that could improve 403(b) participant outcomes, we conducted case studies of five states. We selected states with the aim of providing a range of approaches regarding how a state structures its relationship with service providers and the type of disclosures provided to participants. We aimed to provide a range of state experiences and regulatory approaches by using the following criteria to select our states: open-access versus closed-access system; recent regulatory or restructuring activity regarding 403(b) plan administration in the state; any notable experiences or outcomes; availability of fee data; and general transparency.⁹ We developed an initial list of seven case studies. This list was later narrowed to five due to a lack of information and responses by two selected states.¹⁰ We selected the following five states: California, Connecticut, Delaware, Kansas, and Texas. These case studies are not generalizable to the broader universe of 403(b) plans.

As part of our case studies, we interviewed officials and state plan sponsors or administrators of 403(b) plans in California, Connecticut, Delaware, Kansas, including the California State Teachers' Retirement System, Connecticut's Office of the State Comptroller, Delaware's Office of the State Treasurer and the Attorney General's Office, and the Kansas Board of Regents. We also interviewed a representative from the Texas Teachers Retirement System who was knowledgeable about the state's statutory changes. We also obtained and reviewed available information

⁹We analyzed two studies that describe the different states' approaches to regulation of 403(b) as, broadly, as being either open access or closed access systems. See TIAA-CREF Institute, *Trends and Issues – Who's Watching the Door? How Improving 403(b) Administrative Oversight Can Improve Educators' Retirement Outcomes* (November 2010) accessed June 15, 2022, <https://www.tiaa.org/public/institute/publication/2010/whos-watching-door-how-improving-403b> and *403(b) Plans For Public School Teachers: How They Are Monitored Regulated in Each State* (March 2013) accessed June 15, 2022 at <https://www.tiaa.org/public/institute/publication/2013/403b-plans-public-school-teachers>. We also reviewed a list from the National Tax-Deferred Savings Association (NTSA) that identifies the 17 state-sponsored 403(b) plans. See Michael Webb, *State Sponsored Plans: A Closer Look* (Arlington, Va.: National Tax-Deferred Savings Association), accessed Aug. 20, 2020, <https://www.nts-net.org/state-sponsored-403b-plans-closer-look>.

¹⁰In October 2022 we elected to drop Pennsylvania as a case study, and in March 2023 we elected to drop Florida as a case study, due to lack of sufficient information and response from the state.

on plan fees, policies, and other plan documentation from all five states, as feasible.¹¹

In addition, to obtain information regarding fixed and indexed annuities since they are regulated at the state level, we obtained contacts for each state's insurance commission from a national association representing state insurance commissioners. We sent a written list of questions to each state insurance commissioner. We received responses from the following four of our five selected states' insurance commissions: the California Department of Insurance, the State of Connecticut Insurance Department, the Delaware Department of Insurance, and the Texas Department of Insurance.

We did not conduct an independent legal analysis to verify the information provided about the laws, regulations, or policies of the states selected for this study. Rather, we corroborated our review of states' laws with interviews and other secondary sources such as documentation regarding state agency policies and procedures. We provided a summary of this information to agency officials for their review and corroboration.¹² We incorporated technical corrections as appropriate.

Methodology to Identify Options Stakeholders Have Identified that Could Improve Participant Outcomes

To identify options stakeholders have identified that could improve outcomes for 403(b) participants, we conducted interviews with stakeholders and experts in the retirement planning industry. These stakeholders and experts included representatives of industry associations, research organizations, and service providers to 403(b) plans. We identified these representatives as being knowledgeable about

¹¹We obtained information selected states by, where feasible, obtaining and analyzing information regarding each state's regulatory structure for 403(b) retirement plans from a number of sources, including laws, regulations, and other relevant information from states' public websites, as well as obtaining information from interviews with state stakeholders and experts. In some cases, our review of available information and interviews with state officials, as feasible, did not find any information regarding selected criteria, in which case we will report that that state was "none identified" for that particular criterion.

¹²For the Texas case study, a representative knowledgeable about the state's regulatory changes reviewed and confirmed a summary of the state law prior to regulatory changes in 2019; we also relied on information from our September 2009 report, [GAO-09-641](#), and other information.

403(b) plans based on their published research or other documentation, or based on referrals from other organizations we interviewed.

In total, we interviewed representatives of 23 organizations, including 16 in connection with data collection for our March 2022 report, and seven organizations, including one national teacher’s association, in connection with this engagement.¹³ We defined “stakeholders” as individuals or entities with knowledge in the subject matter but with a financial or advocacy interest in one or more aspects of 403(b) plans. Some of these stakeholders represented 403(b) plan sponsors, others represented service providers, while still others represented groups of participants. We defined “experts” as individuals or entities with knowledge in the subject matter but without a specific financial or advocacy stake, including academics who study the industry, state regulators (who are also not themselves sponsors of or service providers to 403(b) plans), and companies who furnish analysis of these plans to clients but are not themselves involved in the industry directly. As explained below, we relied on open-ended questions in interviews with experts and stakeholders to help us develop the list of policy options we subsequently asked about in the survey; as such, we did not systematically prompt all the experts and stakeholders for responses with respect to each of the options discussed in this report. Because we selected stakeholders and experts to interview, information obtained by these interviews is not generalizable. In this report, when discussing expert and stakeholder opinions, we used the term “several” to refer to situations where three or four stakeholders we interviewed cited a particular policy option and the term “multiple” (or, in one case, the term “commonly cited”) to refer to situations where five or more stakeholders we interviewed cited a particular policy option.¹⁴

To identify options stakeholders might identify to improve options for participants, we analyzed responses from selected questions in two surveys of 403(b) plan sponsors and service providers we conducted for our March 2022 report. For this report, we asked two questions about a series of policy options and whether implementing those options might improve outcomes for 403(b) plan participants; one focused on federal oversight actions while the other focused more broadly on policy options or practices. The two questions contained a total of 13 policy options and two open-ended spaces where respondents could propose other ideas for

¹³[GAO-22-104439](#).

¹⁴We note that of all policy options cited by experts and stakeholders, six represents the highest number cited in our interviews.

improving 403(b) plan participants. We developed this set of policy options via reading reports from expert institutions and one government advisory panel. We also developed them via interviews with experts and stakeholders knowledgeable in the industry, based on their published research or other documentation, or based on referrals from other organizations we interviewed. To ensure that these questions were well-understood by our survey participants, we pretested our surveys with three 403(b) plan sponsors, two 403(b) service providers, one stakeholder representing 403(b) participant groups, one stakeholder representing the retirement planning industry, and one other expert knowledgeable in the field prior to finalizing the survey.

No comprehensive sources of data on sponsors of or service providers for 403(b) plans exist. As such we used multiple methods to identify our survey populations: one population consisted of four sets of 403(b) plan sponsors and another consisted of 403(b) record keepers, third-party administrators, vendors, and consultants.

In total, we received completed surveys from 26 sponsors of 403(b) plans after reaching out to 64 such plan sponsors. However, one of those 403(b) plan sponsors did not participate in the two survey questions we cover in this report, meaning we had 25 survey respondents in this category. Among those 25 respondents were 10 state sponsors, two public university system plans, seven large school districts, one small school district, and five tax-exempt organizations. Among the four sets of 403(b) plan sponsors, we obtained the following response rate:

- Nine of 14 state-sponsored 403(b) plans, based on research compiled by and identified in a list published by the National Tax Deferred Savings Association (we excluded two state-sponsored plans that were no longer in existence, but did include one plan, discontinued in 2020, whose sponsor filled out a survey);¹⁵
- Five of 11 of the largest 403(b) plan sponsors, as identified by *Pensions and Investments* (we excluded one such plan that also appeared on the list of state-sponsored plans above, to avoid double counting);¹⁶

¹⁵The National Tax-Deferred Savings Association is an industry group whose members include 403(b) and 457 plan sponsors and service providers.

¹⁶*Pensions and Investments* is a news publication written for pension, portfolio, and investment management executives in the institutional investment market.

- Four of 14 small 403(b) plan sponsors, as identified by a random sample of plans from DOL’s 2018 5500 filings of 99 or fewer participants and plans from the Form 5500 filings with \$1 million or less in total assets (excluding two entities for no longer having 403(b) plans, one entity for appearing to no longer exist, and two other entities for having plan assets above the \$1 million threshold);¹⁷ and
- Seven of 26 K-12 school districts, by the following methods:
 - Five of the 10 largest districts as measured by the number of students in the district and selected by a certainty sample,
 - One of the 20 districts randomly selected out of the remaining districts in 50 states plus the District of Columbia, as measured by number of students in the district by the National Center for Education Statistics (NCES), and
 - One sponsor of a plan that covers multiple K-12 school districts.

We excluded five K-12 school districts from an initial list of 30, because plan administrators told us that the district did not have a 403(b) plan, because school officials had no contact information for administrators or any participant information, or because the district appeared not to exist anymore. We included one plan sponsor whose plan covers multiple K-12 districts mentioned above after initially reaching out to them as a service provider.

In addition, we selected respondents from a group of large record keepers, third-party administrators, consultants, and vendors, which we collectively refer to as “service providers” when discussing the results of this survey. As with the plan sponsors, no comprehensive source of data on such entities or their roles in 403(b) plans exists, so we used multiple sources to select our target population, including:

- J.P. Morgan published a white paper listing the top 10 vendors of variable annuities, a key component of 403(b) plan assets.¹⁸ We

¹⁷As explained above, this figure excludes one 403(b) plan sponsors who did not answer the two questions we discuss in this report, but otherwise participated in the survey.

¹⁸J.P. Morgan, *Variable Annuity Market Trends* (New York: North American Equity Research, 2020).

received five responses from this group and excluded two entities who indicated to us that they were not 403(b) service providers; our response rate from this group was five of eight.

- *Pensions and Investments* produces an annual list of the most-used managers, consultants, and custodians for both defined contribution and defined benefit plans, and the September 30, 2020 issue listed 14 entities. We received four responses from this group and excluded three entities who indicated to us that they were not 403(b) service providers; our response rate from this group was four of 11.
- The Plan Sponsor Council of America, a trade association representing sponsors of retirement plans, conducts a periodic survey of plan sponsors and has a question on that survey that asks its members to name their service provider. This list yielded the names of seven entities who did not already appear on one of the above lists. We received four responses from this group and excluded one entity who indicated to us that they were not 403(b) service providers; our response rate from this group was four of six.
- Interviews with experts in the 403(b) field identified 18 other parties. We received eight survey responses from this group. We excluded three of these potential respondents—one because they said they were neither a 403(b) record keeper nor administrator, one because they told us they were exiting the 403(b) business, and one because we determined they would be more appropriately classified as a plan sponsor; our response rate from this group was eight of 15.

We reached out to a total of 49 potential respondents, of which we excluded nine for the reasons described above. We received a total of 21 respondents from record keepers, administrators, consultants, or vendors.¹⁹ Our response rate across all of all above groups was 21 of 40.

We conducted our surveys from May 2021 to May 2022. No authoritative list of plan sponsors or service providers exists. Therefore, we selected our survey populations as described above, and we did not have the

¹⁹This figure includes two service providers that did not respond to survey questions pertaining to our March 2022 report, [GAO-22-104439](#), but did answer the two questions related to this report. This total does not include one respondent that had been identified as a service provider and that we later identified as a multiemployer plan sponsor for a set of multiple K-12 school districts. That response is included in our population of plan sponsors, as discussed above.

ability to generate a random sample of the populations, or any subset thereof, and our survey results are not generalizable.

To further identify approaches different parties have undertaken or could undertake to improve outcomes for participants in 403(b) retirement plans, we also analyzed settlement agreements of cases involving 403(b) plan sponsors and participants from 2015 onward.²⁰ We performed a series of internet searches for 403(b)-related litigation, looking for cases that were settled, or where a judgment was entered, from 2015 onward. We searched for information in the Westlaw database regarding cases involving different kinds of 403(b) plan sponsors, looking specifically for cases that were settled, or where a judgement was entered, between 2015 and 2022.²¹ We included search criteria to capture cases involving one or more non-ERISA 403(b) plans, but its searches did not turn up any cases involving non-ERISA 403(b) plans. The settlement agreements are specific to the facts and circumstances of each case, and our settlement agreements all pertained to ERISA 403(b) plans. Therefore, the analysis did not include 403(b) plans sponsored by either governmental (e.g., public school districts) or church entities, since those plans are generally not subject to ERISA; all of the settlements we found were with tax-exempt entities in either the higher education or health care sectors.

We reviewed a total of 18 settlements, 13 of which included at least one nonmonetary settlement term, and discussed some of the nonmonetary terms that appeared in those settlements.²² Because the nature of a settlement agreement depends on the specific facts and circumstances involved in the dispute, the results of our review of these settlement agreements are not generalizable.

We conducted this performance audit from December 2021 through June 2023 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for

²⁰We interviewed a representative of a law firm that has served as plaintiff's counsel for several of these 403(b) cases who told us that the first case involving a 403(b) plan sponsor being sued by participants over excessive fees or poorly performing investment options was settled in 2015. This representative also provided us with some settlement agreements.

²¹Our searches did not identify any cases where a final judgment where defendants were found to have either breached or not breached their fiduciary duties under ERISA, was entered.

²²The other five settlements we examined contained only monetary settlement terms.

**Appendix I: Objectives, Scope, and
Methodology**

our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

Appendix II: Selected Features of State 403(b) Regulatory Environments

We reached out to state officials in five selected states—California, Connecticut, Delaware, Kansas, and Texas—who identified relevant state laws and provided documentation on state non-ERISA 403(b) plan regulations and policies. We interviewed state officials in California, Connecticut, Delaware, and Kansas.¹ We also interviewed other knowledgeable stakeholders and experts, including an official from Texas who understands the state’s regulatory environment.

In addition, because fixed and indexed annuities may be subject to laws administered by state insurance commissions, we obtained contacts in each state’s insurance commission from a national association representing state insurance commissioners and sent a shorter set of questions for response to State insurance commissioners. We received responses from four of our five selected states’ insurance commissions.

We aimed to provide a range of state experiences and regulatory approaches by using the following criteria to select our states: open-access versus closed-access system;² recent regulatory activity and reorganization regarding 403(b) plan administration in the state; and availability of fee data and plan provider information.³ We did not conduct

¹These state officials were also the state’s 403(b) plan sponsors or administrators.

²We analyzed two studies that describe the different states’ approaches to regulation of 403(b) as, broadly, as being either open access or closed access systems. See TIAA-CREF Institute, *Trends and Issues – Who’s Watching the Door? How Improving 403(b) Administrative Oversight Can Improve Educators’ Retirement Outcomes* (November 2010); and TIAA-CREF Institute, *Research Dialogue – 403(b) Plans for Public School Teachers: How They Are Monitored and Regulated in Each State* (March 2013). We also reviewed a list from the National Tax-Deferred Savings Association that identifies the 17 state-sponsored 403(b) plans. See Michael Webb, *State Sponsored Plans: A Closer Look* (Arlington, Va.: National Tax-Deferred Savings Association), accessed Aug. 20, 2020, <https://www.nts-net.org/state-sponsored-403b-plans-closer-look>.

³Among our selected states, Connecticut and Delaware’s 403(b) plan generally applies statewide for eligible employees; California’s applies to the CalSTRS Pension2 retirement plan offered statewide to participants; Kansas’s applies to employees in higher education; and we did not identify state laws or regulations that applied to a uniform group of participants in Texas.

**Appendix II: Selected Features of State 403(b)
Regulatory Environments**

an independent legal analysis to verify the information provided about the laws and regulations of the states selected for this study. Rather, we relied on interviews with state officials and secondary sources such as documentation regarding state agency policies and procedures. We submitted key report excerpts to agency and plan officials in each state, as appropriate, for their review and verification. These case studies are not generalizable to the broader universe of 403(b) plans.

California



CALIFORNIA REPUBLIC

Source: GAO. | GAO-23-105620

At a Glance

CalSTRS Pension2 provides state education employees, such as K-12 public school teachers, with a voluntary 403(b) plan, which is supplemental to their defined benefit pension. The plan has assets of approximately \$1.5 billion and about 21,000 total participants. The total number of assets and participants in non-ERISA 403(b) plans statewide is unknown.

Summary of Reported State Actions to Protect Participants

California uses an open-access model whereby “any willing provider” that meets specified criteria can offer investment options. Under this model, participants may have access to hundreds of investment options. In order to help participants make informed choices of 403(b) investment options, the California State Teachers’ Retirement System (CalSTRS) provides its public sector workers with a comparison tool to help them select from a wide array of investment options for their 403(b) plan and allows participants to compare information on fees. In addition, on an ongoing basis, CalSTRS Pension2 participants receive quarterly statements providing investment option and administrative fee information similar to disclosures required for private sector 403(b) plans covered by ERISA.

Source: GAO analysis of interviews with state government officials, CalSTRS officials, and state documentation; Art Explosion (flag). | GAO-22-105620

State legal or regulatory protections for 403(b) plan participants?

Fiduciary measures? No. According to CalSTRS officials, there are no fiduciary standards in place for non-ERISA 403(b) plans. California does not have any laws or regulations to attach fiduciary duties to purveyors/vendors of annuities or insurance products offered as 403(b) investment options, nor does it have a prudent investor law, according to state officials.

Conflict of interest prohibition? None, according to a state official.

Participant protections provided under state regulation of fixed or indexed annuities? Limited. An official at the California Department of Insurance stated that the California Life & Health Insurance Guarantee Association—an association of all insurance companies licensed in the state—provides limited protection to policyholders, including 403(b) participants, when an insurance company licensed in the state becomes insolvent.

Aspects of ERISA adopted as best practices? No. According to CalSTRS officials the state has not formally adopted elements of ERISA.

Request for proposal (RFP) process for hiring service providers?

RFP required? Yes, for the CalSTRS Pension2 Plan. According to CalSTRS officials, based on the RFP governing the selection of the service provider, the contract cannot exceed 10 years. Potential service providers state their fees within the fee proposal as part of a bid submission. Based on the scoring criteria within an RFP, the fee proposal is assigned a weight. Proposals are evaluated with 70 percent of the decision-making based on the technical proposal and questionnaire evaluation, and 30 percent based on the accompanying fee proposal.

Participant access to plan information or comparison tools?

State registry of vendors? Yes, at CalSTRS 403bCompare website

State registry of products? Yes, at CalSTRS 403bCompare website

Summary fee data on plan investment options available to participants? Yes. According to CalSTRS officials CalSTRS Pension2 participants are provided with an ERISA-like quarterly statement that includes information on investment and administrative fees.

CalSTRS officials noted that, despite these efforts to provide participants with information about their investment options, some participants select options without understanding the underlying fee structure. The officials noted that they often receive complaints from teachers who do not understand their 403(b) investment option or fees.

Connecticut



Source: GAO. | GAO-23-105620

At a Glance

Connecticut provides state education employees, such as K-12 public school teachers and public sector community college and university employees, with a voluntary 403(b) plan, which is supplemental to their defined benefit pension. The 403(b) plan has assets of approximately \$1.1 billion and 8,775 total participants.

Summary of Reported State Actions to Protect Participants

Connecticut is a closed-access system with one contracted record keeper that manages the investment providers. An official from Connecticut's Office of the State Comptroller said these actions were undertaken to leverage the combined assets in the state's 403(b), 457, and 401(a) plans and place them under a single record keeper, to streamline the investment menu, and to obtain lower investment fees for participants. Officials said they went from an average annual fee of about 1.6 percent preconsolidation in 2004 to an average annual fee of 0.4 percent with institutionally priced mutual funds. Some passively managed funds have annual fees as low as 0.02 percent. Officials noted the contracted record keeper is responsible for providing not only administrative functions and support for the plan, but is also required to offer comprehensive investor education to participants by salaried (i.e., non-commission-based) retirement counselors.

Source: GAO analysis of interviews with state government officials, plan administrators, experts and state documentation; Art Explosion (flags). | GAO-22-105620

State legal or regulatory protections for 403(b) plan participants

Fiduciary measures? No, according to a state official.

Conflict of interest prohibition? Yes. A Connecticut official confirmed that state law applies; the law requires service providers to disclose any conflicts of interest, including any fees paid to an investment advisor for investment advice given directly or indirectly to participants.

Participant protections provided under state regulation of fixed or indexed annuities? Yes, according to Connecticut officials. For example, a regulation for annuities that became effective in 2022 requires that a vendor represent the best interest of the participant so that the needs and financial objectives of the participant are effectively addressed.

Aspects of ERISA adopted as best practices? Yes. Connecticut officials said that the plan is committed to following fiduciary standards outlined in ERISA. For example, the plan has an investment committee that regularly monitors performance of plan investment options. The committee meets regularly with the record keeper to review participant behavior and to identify trends or concerns that might warrant further educational efforts.

Request for proposal (RFP) process for hiring service providers

RFP required? Yes, according to plan documentation. Connecticut recompetes its contract for a service provider for its 403(b) plan every 5 years; the most recent RFP was in 2019. The stated purpose of the RFP is to solicit proposals from qualified firms to obtain the highest-quality services at the most favorable cost (i.e., the maximum value for the benefits proposed). Officials noted that the plan requires that any revenue paid to a record keeper, as well as any distribution or service fees and revenue sharing for sales fees, be reimbursed to the plan and be deposited into an administrative expense account and used for legal and plan investment consultant expenses; amounts in excess of needs are distributed to participants.

Participant access to plan information or comparison tools

State registry of vendors? Yes, according to a Connecticut official. An official noted the state has a single record keeper, and a state official noted the Comptroller's office has a list of all investment options the plan offers. The official noted that all investment providers contract directly with the record keeper, except for the manager of the Stable Value fund, which provides participants a guaranteed interest rate on assets in the investment option.

State registry of products? Yes. A Connecticut official said the Comptroller's office maintains a list of investment options for the 403(b) plan. Officials noted the state has a single record keeper, and all investment providers (except for the Stable Value manager) contract directly with the record keeper.

Summary fee data on plan investment options available to participants?
Yes. According to Connecticut officials, fee data is available on the plan website.

State legal requirements identified by state officials or experts

A Connecticut official directed us to a law noting that in 1995, the State of Connecticut transferred authority for administration for the 403(b) Plan from the Board of Trustees for Higher Education to the Office of the State Comptroller. See CONN. GEN. STAT. § 5-264 (2023).

Delaware



Source: GAO. | GAO-23-105620

At a Glance

Delaware provides state education employees, such as K-12 public school teachers, with a voluntary 403(b) plan, which is supplemental to their defined benefit pension. The plan has assets of about \$650 million and about 14,600 total participants.

Summary of Reported State Actions to Protect Participants

Delaware is a closed-access system state, with a Plans Management Board that manages and administers the state's 403(b) plan. According to plan documentation, the board is charged with maintaining fiduciary duties to the plan, including performing duties solely in the interests of participants and beneficiaries of the plan. The board also uses an RFP process to select its service provider for the plan based on the quality of administrative support it has provided to plan sponsors and its record of participant communication and education, among other things. The plan has been able to secure lower fees for its participants by consolidating its plan investment options. As part of its contract, vendors send participants quarterly statements of investment fund performance and administrative and investment management fees similar to those required under ERISA.

Source: GAO analysis of interviews with state government officials and state documentation;
Art Explosion (flags). | GAO-22-105620

State legal or regulatory protections for 403(b) plan participants

Fiduciary measures? Yes. According to an official in Delaware's Attorney General's Office, fiduciary duties are attached to 403(b) plan administration through the Plans Management Board, which has policies governing fiduciary decisions and apportionment and allocation of plan expenses. The law establishing the board states that it and its members shall discharge their duties solely in the interests of the participants and beneficiaries of the plan, and each shall act with the care, prudence, skill, and diligence of a prudent person acting in a like capacity and familiar with such matters. The board also has a policy document that states, for example, that no fees shall be paid by the plan unless they are direct expenses of the plan, no fees shall be paid unless they are reasonable, and expenses for salaries and benefits for staff who support the plans, including the state's 403(b) plan, may be allocated proportionally across the plans based on asset values.

Conflict of interest prohibition? Yes. According to Delaware Attorney General officials, Delaware state law includes a code of conduct, Title 29, Chapter 58 of the Delaware Code, applicable to the members of the Board, who are "honorary officials" as defined in Chapter 58. The Office of the State Treasurer has adopted a conflict of interest policy to govern individuals involved in plan administration.

Participant protections provided under state regulation of fixed or indexed annuities? Yes. According to an official from the Delaware Attorney General's office, Delaware has adopted a best interest standard for agents, brokers and insurance agents selling annuities, but the relevant regulation explicitly does not establish a fiduciary duty. It also requires disclosure by the broker-agent at time of sale whether the broker-agent is receiving compensation for the sale.

Aspects of ERISA adopted as best practices? Yes. An official in Delaware's Attorney General's Office stated Delaware has an 'ERISA-like' standard governing fiduciary decisions and looks to ERISA for guidance for best practices. As noted above, the law establishing the board states that it and its members shall discharge their duties solely in the interests of the participants and beneficiaries of the plan, and each shall act with the care, prudence, skill, and diligence of a prudent person acting in a like capacity and familiar with such matters.

Request for proposal (RFP) process for hiring service providers

RFP required? Yes, an official said an RFP process is required under state law. The Office of the State Treasurer governs the RFP processes and is the administrative arm for the Board, and the Board is responsible for the selection of plan service provider. The RFP contract is for 5 years with the state option for three 1-year extensions. The state completed its most recent RFP in 2021, and fees made up approximately 20 percent of the score weighting, according to state officials. Potential service providers were asked to present their fees in basis points against plan

assets as well as a per-participant dollar figure. According to officials, the service provider also had to agree that they could present fees charged to participants on participants' quarterly statements to provide transparency.

Participant access to plan information or comparison tools

State registry of vendors? No. According to an official in the Office of the State Treasurer, from January 1, 2009 to September 16, 2016, a list of approved vendors that included fees, charges, and expenses was made available to participants on the State Treasurer website. This list was updated in 2020 to help plan representatives discuss in plan exchange options with participants. A state official said that the state does not currently have the list available because Delaware has moved to a single vendor and fees and charges are posted on participant statements.

State registry of products? No. According to an official, the state does not offer a list of 403(b) investment products, but, as noted above, the state has moved to a single vendor and relevant information is sent to participants in their participant statements.

Summary fee data on plan investment options available to participants? According to a Delaware official, fact sheets for plan investment options are available on the plan's website. Recordkeeping and administrative expenses are expressed in basis points and as dollar figures on participants' statements.

State legal requirements identified by state officials or experts

Section 2722(d) of the Delaware Code, and also Deferred Compensation For Public Officers And Employees Of The State at Title 29, Chapter 60A of the Delaware Code. In addition, according to state Department of Insurance officials, Delaware's regulations governing annuity sales and transactions are at Title 18, Regulation 1214 regarding Suitability in Annuity Transactions.

Kansas



Source: GAO. | GAO-23-105620

At a Glance

Kansas has a closed-access system within its state, with the Kansas Board of Regents (KBOR) administering—and serving as a fiduciary for—a mandatory 403(b) retirement plan and a voluntary 403(b) retirement plan for eligible higher education employees. The state's plans are for higher education public school employees and have total assets of more than \$5.4 billion in assets and about 32,000 total participants.

Summary of Reported State Actions to Protect Participants

Kansas moved to a closed-access system for its 403(b) plans for state higher education employees. A KBOR official noted that historically, from 1974 to 2007, any eligible company that could meet the requirements of the Board's third-party administrator could be an approved vendor for the Voluntary Plan. In 2007, the number of authorized vendors for the mandatory 403(b) plan was reduced from four to two. Effective January 2021, the voluntary retirement plan was reduced to the same two vendors and oversight was extended to the voluntary plan. According to a KBOR official these actions resulted in fee reductions for its two contracted providers. For example, one of its service providers reduced its fees from 0.12 percent annually to 0.08 percent annually.

Source: GAO analysis of interviews with a KBOR official and state documentation; Art Explosion (flags). | GAO-22-105620

State legal or regulatory protections for 403(b) plan participants

Fiduciary measures? Yes. Kansas has adopted the Kansas Uniform Trust Code, K.S.A. 58a-101, et seq., which according to a state official applies fiduciary duties to KBOR's 403(b) plan. For example, the plan's investment policy statement states that the board recognizes the importance to act with skill, care, prudence, and diligence in all matters relating to the plan and to perform its duties with respect to the plan in the interests of the participants and their beneficiaries and in accordance with the governing Plan document.

Conflict of interest prohibition? Yes. A KBOR official stated that the Retirement Plan Committee charter addresses conflict of interest, in that plan committee members generally should not have a substantial interest in any funds that are offered in the Mandatory Retirement Plan or in any investment providers that offer products in the Mandatory or Voluntary Retirement plans. For example, committee members should not have a legal or financial interest of more than 5 percent of a fund's assets or the ownership of an investment provider. Members also complete an annual statement that notes any substantial interests that could interfere with the exercise of independent action and judgment as a committee member.

Participant protections provided under state regulation of fixed or indexed annuities? None identified specifically for 403(b) plans.

Aspects of ERISA adopted as best practices? Yes. A KBOR official noted that such responsibilities are in the KBOR Retirement Plan Committee charter. The document notes that, among other things, the Retirement Plan Committee is responsible for ensuring that proper due diligence is conducted in the selection of investment managers and/or investment funds, monitoring and evaluating performance results achieved by the investment managers, and reviewing at least annually that all services provided to the plans are necessary and that the costs of those services is reasonable.

Request for proposal (RFP) process for hiring service providers

RFP required? Yes. According to KBOR plan documentation, a formal benchmarking review process is to occur every 4 years, and an RFP every 8 years. An official noted that fee structures, including participant expenses and fund related expenses, are important aspects of all reviews.

Participant access to plan information or comparison tools

State registry of vendors? Yes, according to a KBOR official. The official said the KBOR Retirement Plan Committee meets semi-annually and the plan consultant's report for the semi-annual review of the 403(b) plans is posted on the KBOR website.

State registry of products? Yes. A KBOR official said each quarter, the plan's service providers provide a comparison chart showing the fund

performance and expense ratio as well as the industry ratings. This chart is on the KBOR website and is shared with each of the state universities to post and distribute.

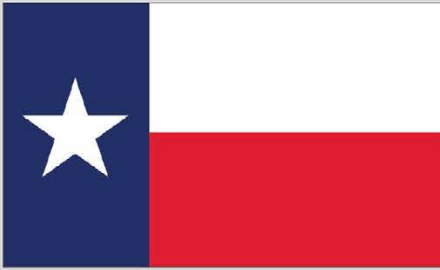
Summary fee data on plan investment options available to participants?

Yes, available on the KBOR website. In addition, according to a KBOR official, the service providers provide fee data to participants in multiple places, including on both the KBOR dedicated quarterly statements and a website for participants. For example, according to a KBOR official, one of the plan's service provider's fees assessed to a participant account are displayed on a participant quarterly statement, which includes transaction details and a description of any administrative or personalized service fees that apply to specific features and investments that a participant requests, such as a loan origination fee. A KBOR official also stated the service provider's quarterly statements provide the appropriate messaging to be consistent with the with participant fee disclosure regulations required by ERISA.

State legal requirements identified by state officials or experts

KAN. STAT. ANN. § 74-4925 (2023): Administration of a retirement plan for state employees, and KAN. STAT. ANN. § 74-4925b (2023): Eligibility for employer contributions.

Texas



Source: GAO. | GAO-23-105620

At a Glance

There is no statewide 403(b) plan in Texas. Individual school districts and other eligible entities may choose to provide a plan for their employees. The total amount of assets and the number of participants in these plans in the state is unknown.

Summary of Reported State Actions

Texas uses an open-access model to allow a wide range of vendors to offer investment options, should an eligible employer choose to offer a 403(b) plan. In 2019, the state removed several requirements that had previously been in place for vendors to these plans.

According to our previous reporting in September 2009 (GAO-09-641), Texas at the time required vendors to register with the state. As we reported, Texas at the time had a more stringent disclosure requirement than the federal government. In particular, it required specific disclosure of all fees for service providers licensed to sell products to participants in public sector 403(b) plans. We also reported that Texas had established an online registry with fees disclosed in a consistent format to facilitate comparison of 403(b) service providers' fees. In addition, Texas had required that investment option providers meet certain experience and disclosure requirements, and investment options were subject to a fee cap.

Source: GAO analysis of interviews with a state official, Teachers Retirement System of Texas representative, and state documentation;
Art Explosion (flags). | GAO-22-105620

State legal or regulatory protections for 403(b) plan participants

Fiduciary measures? None identified.

Conflict of interest prohibition? None identified.

Participant protections provided under state regulation of fixed or indexed annuities? No. According to a Texas Department of Insurance official companies are required to file 403(b) endorsements with the department so they can be attached to the annuity contracts, but the department does not review the 403(b) endorsements. The official stated the endorsements are filed as exempt and the insurance department has review standards because 403(b) plans are regulated under federal law.

Aspects of ERISA adopted as best practices? None Identified.

Request for proposal (RFP) process for hiring service providers

RFP required? Not applicable.

Participant access to plan information or comparison tools

State registry of vendors? No. The Teachers Retirement System of Texas no longer certifies 403(b) companies, pursuant to a May 2019 law.

State registry of products? No. TRS no longer maintains a list of registered 403(b) investment products, pursuant to a May 2019 law.

Summary fee data on plan investment options available to participants? None identified.

Recent state actions that affect 403(b) plan participants

A Teachers Retirement System of Texas official directed us to a May 2019 state law that repealed TRS' authority to certify vendors, register investment products, and set fee caps. In particular, the law:

- removed rules that stipulated that investment options have a maximum front-end or back-end commission of 6 percent and that product fees could not exceed 2.75 percent a year;
- ended the requirement that vendors register their 403(b) products with the Teachers Retirement System of Texas; and
- removed rules prohibiting entities that were previously subject to administrative or regulatory actions, had not met authorized capital control levels, or companies whose audits had revealed material adverse financial conditions from providing investment options.

For more information, see An Act Relating to the Registration and Certification of Certain Investment Products Made Available to Public School Employees, Acts of the 86th Legislature, 2019, Article 6228a-5, Vernon's Texas Civil Statutes.

Appendix III: Results of GAO's Surveys of 403(b) Plan Sponsors and Service Providers

Our survey of 25 403(b) plan sponsors and 21 403(b) service providers outlined a series of potential policy options that might improve outcomes for participants in 403(b) plans.¹ In connection with our March 2022 report, we conducted two surveys—one of 403(b) plan sponsors and the other of 403(b) service providers, that variously act as record keepers, administrators, consultants, or product vendors for 403(b) plans.² Among the topics we asked respondents were two questions about a series of 13 policy options that appear below.³ The survey results are shown in figure 10.

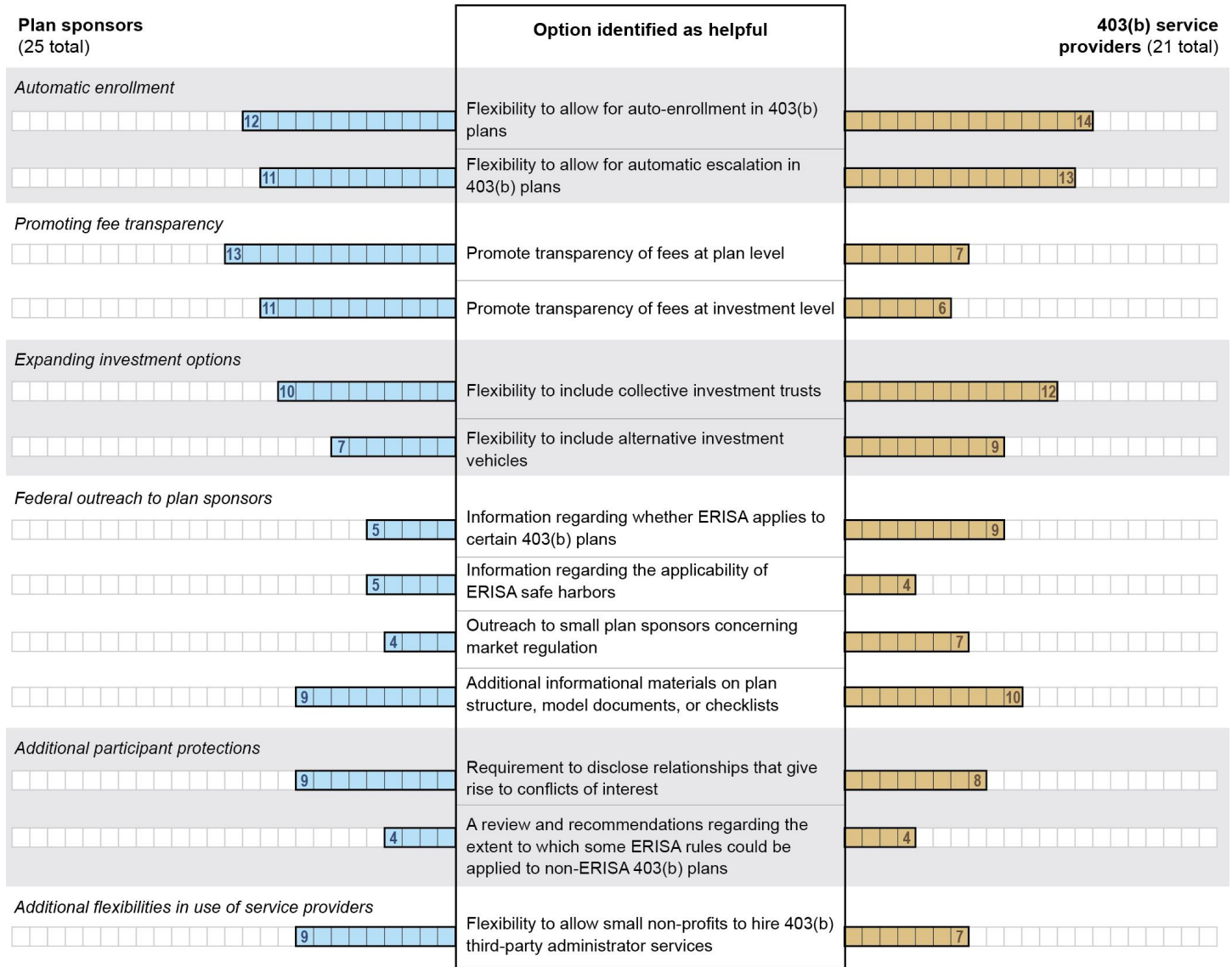
¹For the purposes of this report, we did not count one plan sponsor that was included in the previous report's plan sponsor survey reporting totals, because this plan sponsor did not answer either of the two questions relevant to this report. We did, in addition to those service providers included in the March 2022 report, include an additional two service providers who answered both of the relevant questions for this report but did not otherwise participate in the survey (and its applicable information for the March 2022 report). In order to ensure that these questions were well-understood by our survey participants, we pretested our surveys with three 403(b) plan sponsors, two 403(b) service providers, one stakeholder representing 403(b) participant groups, one stakeholder representing the retirement planning industry, and one other expert knowledgeable in the field prior to finalizing the survey.

²We asked survey respondents a series of questions regarding different characteristics of the 403(b) plans that the respondents either sponsored or provided services for, including the investment options found in those plans and their fee structures, and reported this information in our March 2022 report, [GAO-22-104439](#).

³Since we actively selected survey populations and did not generate random samples of plan sponsor or service provider populations, the results of the surveys are not generalizable.

**Appendix III: Results of GAO's Surveys of
403(b) Plan Sponsors and Service Providers**

Figure 10: Results of GAO Survey of 403(b) Plan Sponsors and Service Providers Concerning Policy Options to Improve 403(b) Plan Participant Outcomes



Source: GAO analysis of GAO surveys. | GAO-23-105620

**Appendix III: Results of GAO's Surveys of
403(b) Plan Sponsors and Service Providers**

Accessible Data for Figure 10: Results of GAO Survey of 403(b) Plan Sponsors and Service Providers Concerning Policy Options to Improve 403(b) Plan Participant Outcomes

Category	Option identified as helpful	Plan sponsors (25 total)	403(b) service providers (21 total)
Automatic enrollment	Flexibility to allow for automatic escalation in 403(b) plans	12	14
Automatic enrollment	Flexibility to allow for auto-enrollment in 403(b) plans	11	13
Promoting fee transparency	Promote transparency of fees at investment level	13	7
Promoting fee transparency	Promote transparency of fees at plan level	11	6
Expanding investment options	Flexibility to include collective investment trusts	10	12
Expanding investment options	Flexibility to include alternative investment vehicles	7	9
Federal outreach to plan sponsors	Information regarding whether ERISA applies to certain 403(b) plans	5	9
Federal outreach to plan sponsors	Outreach to small plan sponsors concerning market regulation	5	4
Federal outreach to plan sponsors	Information regarding the applicability of ERISA safe harbors	4	7
Federal outreach to plan sponsors	Additional informational materials on plan structure, model documents, or checklists	9	10
Additional participant protections	Requirement to disclose relationships that give rise to conflicts of interest	9	8
Additional participant protections	A review and recommendations regarding the extent to which some ERISA rules could be applied to non-ERISA 403(b) plans	4	4
Additional flexibilities in use of service providers	Flexibility to allow small non-profits to hire 403(b) third-party administrator services	9	7

Source: GAO analysis of GAO surveys. | GAO-23-105620

Note: ERISA refers to the Employee Retirement Income Security Act of 1974, as amended.

Automatic Enrollment. The two most popular options across all 46 survey respondents both involved facilitating automatic enrollment and automatic escalation in 403(b) plans. According to several stakeholders in the industry, state laws pertaining to wage garnishments may prevent plan sponsors not subject to the Employee Retirement Income Security Act of 1974, as amended (non-ERISA plans) from using automatic

enrollment or automatic escalation. (ERISA preempts such state laws when it applies, so this issue does not apply with respect to 403(b) plans covered by ERISA.) This pair of policy options was the most suggested one among our service provider respondents in particular.

Promoting Fee Transparency. The next two of the 13 policy options concerned promoting transparency of fees—one of the options specified fees at the plan level (e.g., record-keeping and administrative services) while the other specified fees at the investment level (e.g., charges for maintaining plan assets, or trading or transaction costs). These two options were the most popularly selected among plan sponsor respondents in particular.

Expanding Investment Options. The next two of the 13 policy options pertained to expanding the available menu of investment options in 403(b) plans. One of the options specified collective investment trusts (CIT) while the other concerned alternative investment vehicles, which could include real estate investment trusts or private equity funds.⁴

Outreach. The next four of the 13 policy options pertained to various forms of outreach that federal agencies could conduct to assist 403(b) plan sponsors, particularly small 403(b) plan sponsors, with administering their plans. Two of those concerned the applicability of the requirements of ERISA to 403(b) plans, as we heard from several stakeholders that not all plan sponsors fully understood whether ERISA applied to their plans. The third option was more general, calling for outreach to small plan sponsors concerning market regulation. The final, and most popular, option among this group of four was a request for federal agencies provide additional informational materials governing plan structure, model plan documents, or checklists.

Additional 403(b) Participant Protections. The next two options we asked about concerned additional protections for plan participants in non-ERISA 403(b) plans. The first of those concerned conflicts of interest,

⁴A real estate investment trust is a company that owns income-generating real estate, allowing individual investors to earn a share of the income produced by commercial real estate without directly owning commercial real estate. Many real estate investment trusts, like mutual funds, are publicly traded and regulated by the SEC. According to stakeholders we interviewed, real estate investment trusts are a common component of defined benefit retirement plans, are sometimes found in 401(k) plans, and can be used to diversify a retirement plan's portfolio.

while the second concerned applying other protections currently part of ERISA more broadly.

Additional Flexibilities in Use of Service Providers. The final option we included in the survey concerns the ability of some sponsors of 403(b) plans to hire service providers to administer a plan while still meeting the requirements described in what we describe elsewhere in this report as the Limited Employer Involvement safe harbor.⁵ DOL regulations currently do not allow plans making use of this safe harbor to hire a third-party administrator to manage the plan, as DOL considers that action to be incompatible with the meaning of “Limited Employer Involvement.” Several industry stakeholders discussed some of the challenges that plan sponsors or participants may face with respect to those plans. For example, two industry stakeholders discussed how participants might face challenges in finding fee information about investment options in their 403(b) plans. Two other industry stakeholders talked about the limits these plan sponsors face in attempting to improve aspects of their plans within the parameters of the safe harbor.

⁵DOL defined a “safe harbor” for 403(b) plans sponsored by tax-exempt organizations. See [GAO-09-641](#). Plans that meet the conditions described in the safe harbor are not considered subject to Title I of ERISA because they are not considered to have been “established or maintained by an employer.” To fall under this safe harbor, participation in the plan must be voluntary and employers are not allowed to contribute to the plan or make discretionary determinations in administering the plan, such as processing distributions, authorizing plan-to-plan transfers, or making determinations of eligibility for loans or hardship distributions.

Appendix IV: Comments from the Department of Labor

Appendix IV: Comments from the Department of Labor

U.S. Department of Labor

Assistant Secretary for
Employee Benefits Security Administration
Washington, DC 20210



May 17, 2023

Tranchau (Kris) Nguyen
Director, Education, Workforce, and Income Security
United States Government Accountability Office
Washington, DC 20548

Dear Ms. Nguyen:

Thank you for the opportunity to review the Government Accountability Office (GAO) draft report entitled "403(b) Retirement Plans: Department of Labor Should Update Educational Materials to Better Inform Plan Sponsors and Participants" (GAO-23-105620). The draft report contains one recommendation for the Department of Labor (Department):

- The Secretary of Labor should update educational materials and its website to include information relevant to 403(b) plan sponsors and participants. For example, this could include adding information with direct references to 403(b) plans to help participants understand their 403(b) plan fees. (Recommendation 1)

As noted, EBSA has a webpage dedicated to 403(b) plan issues that links to publications with general information related to ERISA Title I retirement plans and also several publications specific to 403(b) plans that were prepared by the IRS: <https://www.dol.gov/agencies/ebsa/key-topics/retirement/403b-plans>. While 403(b) plan investments are limited under provisions of the Internal Revenue Code, we think the information in our 401(k) publications could be helpful to ERISA-covered 403(b) plan sponsors, participants and other interested parties evaluating fees and expenses in those plans. Finally, the Department's final rule applicable to participant-directed individual account plans, which requires disclosure of certain plan and investment-related information including a comparative chart or similar format designed to facilitate a comparison of each investment option available under the plan, applies to ERISA-covered 403(b) plans as well as 401(k) plans. 29 CFR 2550.404a-5 (www.ecfr.gov/current/title-29/subtitle-B/chapter-XXV/subchapter-F/part-2550/section-2550.404a-5).

We appreciate the study you conducted. Accordingly, we will review the relevant publications with an eye to seeing whether we should be more specific about referencing 403(b) plans.

Sincerely,

Lisa M. Gomez

Digitally signed by Lisa M.
Gomez
Date: 2023.05.17 14:47:41
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Lisa M. Gomez
Assistant Secretary

Accessible Text for Appendix IV: Comments from the Department of Labor

May 17, 2023

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Director, Education, Workforce, and Income Security
United States Government Accountability Office
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Sincerely,

Lisa M. Gomez
Assistant Secretary

Appendix V: GAO Contact and Staff Acknowledgments

GAO Contact

Tranchau (Kris) Nguyen, at (202) 512-7215 or nguyentt@gao.gov.

Staff Acknowledgments

In addition to the individual named above, Sharon Hermes (Assistant Director), Michelle Munn (Analyst in Charge), Andrew Bellis, and Timothy Young made key contributions to this report. Nora Boretti, Ted Burik, Holly Dye, Avani Locke, Abigail Loxton, Jessica Mausner, Jason Palmer, Jessica Rider, Joy Solmonson, Curtia Taylor, Frank Todisco, Walter Vance, and Adam Wendel also contributed to this report.

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