

COMMENT LETTER

July 24, 2007

Joint Trade Association Submission to DOL on Participant Disclosure (pdf)

July 24, 2007 FILED ELECTRONICALLY U.S. Department of Labor Employee Benefits Security Administration Office of Regulations and Interpretations 200 Constitution Avenue, NW, Room N-5669 Washington, DC 20210 Attention: Fee Disclosure RFI Re: Fee and Expense Disclosures to Participants in Individual Account Plans Dear Sir or Madam: The undersigned twelve organizations representing both employer sponsors of defined contribution retirement plans as well as the financial institutions that provide services to such plans respectfully submit the attached joint recommendations in response to the Request for Information ("RFI") issued by the Department of Labor (the "Department") regarding fee and expense disclosures to participants in individual account plans, published at 72 Fed. Reg. 20,457 (April 25, 2007). We appreciate the opportunity to provide input on this important matter. Several of the undersigned organizations worked together last year to develop and submit joint recommendations and a fee and expense reference tool with respect to the Department's ongoing project under ERISA Section 408(b)(2) related to fee disclosure between plan fiduciaries and service providers. With the same goal of achieving consensus on how to enhance fee disclosure, an even broader group of interested organizations has worked together over the past several months to develop joint recommendations regarding participant-level disclosure of defined contribution plan fee information. On this important issue, our organizations believe the Department has both the statutory authority and institutional expertise to improve disclosure of fee information to participants without new legislation. We hope the attached recommendations, which have the support of this broad array of organizations active in the retirement policy arena, will be of significant use to the Department as it considers what changes to current disclosure requirements may be appropriate. Our organizations would welcome the opportunity to meet with Department officials to discuss the attached recommendations and will plan to be in contact in this regard. In the meantime, please feel free to contact any of the individuals and organizations listed below. Sincerely, Mary Podesta Senior Counsel - Pension Regulation and Acting General Counsel Investment Company Institute Jan Jacobson Retirement Policy Legal Counsel American Benefits Council Ann Cammack Senior Vice President, Taxes and Retirement Security American Council of Life Insurers Judy Schub Managing Director Committee on Investment of Employee Benefit Assets Mark Ugoretz President The ERISA Industry Committee Lisa Bleier Senior Counsel American Bankers Association David Wray President Profit Sharing / 401(k) Council of America Liz Varley Managing Director Securities Industry and Financial Markets Association Dorothy Coleman Vice President, Tax and Economic Policy National Association of Manufacturers Randel K. Johnson Vice President, Labor, Immigration, & Employee Benefits U.S. Chamber of Commerce Scott Talbott Senior Vice President of Government Affairs The Financial Services

Roundtable Michael Aitken Director, Government Affairs Society for Human Resource Management July 24, 2007 American Bankers Association American Benefits Council American Council of Life Insurers Committee on Investment of Employee Benefit Assets ERISA Industry Committee Financial Services Roundtable Investment Company Institute National Association of Manufacturers Profit Sharing/401(k) Council of America Securities Industry and Financial Markets Association Society for Human Resource Management U.S. Chamber of Commerce Joint Submission to the Department of Labor: Recommendations for Participant-Level Disclosure of Defined Contribution Plan Fee Information • Disclosure Regarding Fees is Important to Defined Contribution Plan Participants. An increasing number of Americans rely on employer-sponsored defined contribution plans (such as 401(k)s) to help them accumulate the savings they will need for a secure retirement. Many defined contribution plan participants make their own investment elections from among the options offered by the plan and it is important that they have appropriate information to assist them in making these decisions. Disclosure about the fees associated with the plan and its investment options are an important component of this information. All defined contribution plans have costs. Participants often pay these costs under arrangements that differ from plan to plan. We believe it is beneficial for participants to have a general understanding of their plan's fee structure and the overall magnitude of the costs they bear as well as to receive fee information that is material in selecting specific investments for their accounts. Disclosure requirements should be evaluated based on whether information provided will be useful to typical plan participants in making investment selections. The benefits to participants should be real rather than hypothetical. More disclosure will not always be better. Under existing legal standards, plan fiduciaries (typically the employer plan sponsor) and service providers have worked hard to provide participants with meaningful, clear and concise information about key characteristics of plan investment options, including fees, and they continually seek to enhance these disclosures. Our organizations are eager to work with policymakers to improve existing legal standards regarding disclosure, where appropriate, to ensure that participants have information to make sound investment decisions. Any prospective enhancements to current law should foster simplicity, flexibility and efficiency in fee disclosure so that the result is a stronger defined contribution system for plan participants rather than one weakened by complex and costly disclosure that fails to serve participants' interests. • Enhanced Disclosure Requirements Regarding Fees Should Extend to All Participant-Directed Retirement Plans. New fee disclosure requirements should apply to all participant-directed individual account retirement plans subject to the Employee Retirement Income Security Act of 1974 (ERISA) rather than only to ERISA 404(c) plans. In this regard, the Department of Labor (DOL) has the authority to promulgate disclosure July 24, 2007 standards for all participant-directed individual account retirement plans under ERISA.¹ The focus of policymakers should be on improving disclosure practices in all participant-directed plans, as this will serve participants' interests more than a detailed reworking of the ERISA 404(c) regulations. • Fee Disclosure to Participants Serves Different Needs Than Fee Disclosure to Plan Fiduciaries. The purposes behind fee disclosure to plan fiduciaries and plan participants are fundamentally different. In selecting and monitoring service providers and in selecting a plan's menu of investment options, plan fiduciaries engage in acts subject to ERISA-imposed obligations, including to act prudently and in the best interest of participants, to pay no more than reasonable compensation and to avoid prohibited conflicts of interest. Such fiduciary determinations are aided by having detailed information about the services provided, fees charged and compensation earned by plan service providers (including through revenue sharing from third parties). Participants, on the other hand, do not select among service providers or determine the menu of plan investment options. They choose investments for their account from a menu of plan investment options selected by the plan

fiduciary. The fees associated with the plan and its investment options are only one of a number of important criteria for making sound investment decisions. The voluminous and detailed information about plan fees and provider compensation (including revenue sharing) that is typically appropriate for plan fiduciaries to consider will not help participants select among plan investment options. Rather, providing this detail to plan participants could impair sound decision-making by overloading them with information, elevating fees above other investment selection criteria (which can produce poor investment decisions) and contributing to the decision paralysis that keeps some participants from joining plans. In light of the many other disclosures plans are required to provide to participants, an additional notice that is unduly detailed or technical will often be a source of aggravation to participants, reducing their interest in plan information generally. Policymakers should keep in mind the distinct purposes behind plan fiduciary and plan participant fee disclosure as they craft new participant disclosure rules.

- **Disclosure to Participants Should Include Expenses That Affect Participants' Choices.** Participants should be informed of the asset-based fees they will be charged for participating in the plan (typically expressed as a rate, in basis points), whether such fees are levied by particular investment options or charged regardless of the specific investment options selected by the participant. Fee disclosure to participants about investment options should also include any additional per-participant charges associated with the investment, such as charges for buying, selling or redeeming the investment (such as front- and back- end sales charges, redemption fees and market value adjustment charges). Plans also should inform participants about the existence of any plan administration or ongoing service charges that participants will pay on a per account (rather than an asset-based) basis. In some plans, asset-based charges on investments not only finance investment management but also defray other plan costs (such as plan administration). Where this is the case, participants should receive a general disclosure that the asset-based fees on investments 1 DOL has authority under ERISA Section 505 to require that all participants who have the right to direct investment of their accounts have basic information about plan investment options. ERISA Section 505 grants DOL authority to issue such regulations as are necessary or appropriate under Title I of ERISA, which includes the statute's fiduciary responsibility requirements. In addition, ERISA Section 109 grants DOL authority to prescribe the content of various reports and documents, including materials furnished or made available to participants.

2 July 24, 2007 defray other plan costs. More detail about the components of asset-based fees is not relevant to the total cost of investing, which is the information participants need. By disclosing the rate of asset-based fees together with information on any additional per account administrative charges, participants will be provided with a clear understanding of the costs of investing under the plan. Participants should also be informed that some transactions or services (e.g., plan loans or use of investment advice, managed account or brokerage window services) will result in additional charges to participant accounts, the specifics of which will be disclosed at the time the participant uses these services. Because most of these transactional charges will never apply to most participants, requiring detailed disclosure to all participants as to the specifics of such charges would make fee disclosure cumbersome and obscure the core information. Detailed information about costs for participant-initiated transactions and services should be made available upon participant request and provided at the time of the transaction. Plan fiduciaries should have flexibility to determine the precise form of the key fee disclosures discussed herein based on the facts and circumstances, but they will typically be expressed as a rate (in basis points) and/or as an illustrative dollar charge.

- **Fee Information Should Appear Alongside Other Key Information Participants Need to Make Investment Decisions.** Fees should be disclosed along with other information participants need to make informed investment decisions. Fee information should not be elevated so as to suggest that fees are

the most important factor in selecting investments from among the plan's options. An undue focus on fees in new required disclosures might encourage participants to select the plan's lowest-cost investment option, which may not be the best choice for a participant. Instead, fees associated with a plan's investment option should be disclosed together with other key information: the option's investment objective and product characteristics, its historical performance and risks and the identity of the investment advisor or product provider. This information should be conveyed in clear and simple terms, and plan fiduciaries should have flexibility to determine the format in which the information is communicated to participants. Web-based disclosure of information about investment options will often be the most useful because it permits participants to browse multiple interrelated pieces of information and access more detailed information about a given investment option or topic of interest to them.

- **Policymakers Should Be Sensitive to Costs When Imposing New Disclosure Requirements.** While participant disclosure should provide sufficient information on fees and other key investment option characteristics for participants to make sound investment decisions, new disclosure requirements come with added costs. Such costs must be justified in terms of providing a material benefit to participants selecting among plan investments. The costs of some potential disclosure requirements would simply be exorbitant and unjustified. Any new disclosure requirements necessarily will impose expenses and burdens on both plan sponsors and plan service providers and will come on top of the multitude of new and costly disclosures required under the Pension Protection Act of 2006. The costs of new disclosure requirements are likely to be reflected in higher prices for plan administrative services, which are payable from plan assets. As a result, in many defined contribution plans the added costs of new disclosure requirements are likely to be borne in substantial part by plan participants. Plan fiduciaries and providers also will be concerned that expanded disclosure requirements could result in new and costly liabilities, a result that would further increase expenses in the system. New disclosure costs and potential 3 July 24, 2007 liabilities could deter some small employers from sponsoring a qualified retirement plan for employees. Given these considerations, it is imperative that new participant disclosures be focused squarely on providing participants with information that will actually be useful in making investment decisions.
- **Use of Electronic Technologies to Provide Plan Investment and Fee Information Should Be Strongly Encouraged.** One important way to reduce costs and provide more useful information is to take full advantage of electronic mechanisms for delivering and providing access to information. New rules should move beyond existing regulations to permit, and indeed encourage, employers to use internet or intranet posting to deliver and provide access to fee and other information on plan investment options. (We recognize that certain participants without computer access will continue to need access to paper copies.) Notifying participants about the posting or availability of required disclosures on websites will typically be the most inexpensive method of delivery and should be promoted under new disclosure rules. As is common today, plan fiduciaries will work with service providers to provide required information on plan investment options to participants and should be able to connect participants directly to content on the websites of service providers (via click-through web links or otherwise) rather than having to maintain all information on plan investment options and fees on their own internet or intranet site.
- **Disclosure of Fees and Other Plan Investment Information Should Facilitate Comparisons.** While plan fiduciaries should retain flexibility to determine the specific format for communicating fee and other plan investment information to their particular participant population, they should strive to disclose the information in a form that facilitates comparison across the plan's investment options. At the same time, unique features of particular investment options also would have to be communicated. Web-based disclosure methods and tools are likely to be the most useful as they can visually convey the full range of plan investment options while allowing

participants to access more detailed information about each option via click-through web links.

- **Participants Should Have Access to Fee and Other Investment Information at Enrollment and Annually Thereafter.** Participants should receive disclosure about plan fees (asset-based fees, transaction charges associated with investment options, any separate per account administrative fees and the potential for participant-initiated transaction and service charges) and the other key characteristics of investment options when they enroll in the plan and select plan investments for the first time. Some plans, particularly ones that have formulas for reducing plan fees as assets grow, will not know in advance the exact asset-based or per account fee levels that participants can expect in the year ahead. As a result, plan fiduciaries should be permitted to use fee levels from the most recently concluded plan year in the fee disclosures they make to participants at enrollment. In addition, on an annual basis, plan fiduciaries should inform participants where they can find or how they can request updated information on fees and other characteristics of plan investment options (by providing a click-through web link or directing them to an internet or intranet website, telephone number or plan official). Plan fiduciaries should have flexibility as to whether to make this annual disclosure -- regarding where participants can find or how they can request such information -- a stand-alone communication or a component of an existing disclosure document. Plan fiduciaries should ensure that the 4 July 24, 2007 underlying general information on fees and other characteristics of plan investment options is updated annually to reflect any changes.
- **Plans Should Disclose to Participants Administrative and Transaction Dollar Charges Deducted from Participant Accounts.** Participants should receive disclosure regarding any administrative or transaction flat dollar charges that have been deducted from their accounts. Such charges would include per account flat dollar charges imposed on all participants for the costs of plan administration as well as any dollar charges that result from purchases or sales of particular investments or from participant-initiated transactions or services (such as plan loans). Plan fiduciaries should have flexibility as to the means and timing of such disclosures. For example, some fiduciaries may include this information in quarterly benefit statements while others may include it in a confirmation notice following a particular transaction.
- **Participants Have Access to Education Materials that Provide Context for Fee and Other Plan Investment Information.** Participants make the best use of information about their plan investment options (including information regarding fees) when this information builds on basic investment education. The Pension Protection Act of 2006 (PPA) requires that participants have access to investment education materials and a new requirement in this area is not needed. Under PPA, the quarterly benefit statements provided to participants who direct their retirement plan investments must include a notice directing participants to a Department of Labor (DOL) website on individual investing and diversification (<http://www.dol.gov/ebsa/investing.html>). This website includes the DOL's brochure, A Look at 401(k) Plan Fees. Plan sponsors may wish to direct participants to this resource at other times, including at enrollment when they provide participants with initial information on plan investment options and fees. Plan sponsors will also likely want to continue to draw on investment education materials that they and their service providers develop. Given the extensive work by the private sector in the investment education area and the new prominence of the DOL's individual investing website as a result of the PPA requirement, we recommend that the DOL establish a formal and periodic process to seek private-sector input regarding the contents of its site.

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