

## COMMENT LETTER

July 31, 2006

# ICI Letter on Compliance Tool for 401(k) Sponsors (pdf)

July 31, 2006 Robert J. Doyle Director, Office of Regulations and Interpretations Employee Benefits Security Administration U.S. Department of Labor 200 Constitution Ave., NW, Room N5669 Washington, DC 20210 Dear Bob: For many years, the Investment Company Institute (ICI), the American Benefits Council (ABC), the American Council of Life Insurers (ACLI), the American Bankers Association (ABA) and the Securities Industry Association (SIA) have worked to help assure that 401(k) plan fiduciaries have access to the information they need to make sound decisions on behalf of their plans and plan participants. In light of this, we very much appreciate the discussions we have had with you and others in the Department regarding the guidance the Department is developing under ERISA Section 408(b)(2) related to fee disclosure between plan fiduciaries and service providers. To offer input to the Department that may be of help as you formulate the new 408(b)(2) guidance, ICI, ABC, ACLI, ABA and SIA have worked together to develop the attached fee and expense reference tool. The attached list identifies service- and fee-related data elements we believe defined contribution plan sponsors and service providers may want to discuss when entering into agreements. We offer the list as a reference tool for plan sponsors and providers to use in complying with their Robert J. Doyle July 31, 2006 Page 2 of 4 408(b)(2) responsibilities and we hope the Department will recommend its use.<sup>1</sup> We believe that communication regarding the data elements on the list is one way that plan fiduciaries and providers can comply with their disclosure obligations under 408(b)(2). We request that the Department make clear that use of the list is one way, but not the exclusive way, to satisfy such obligations. This list was developed by ICI, ABC, ACLI, ABA and SIA with significant input from the plan sponsor, service provider and consultant communities to reflect best practices used by sponsors, providers and consultants in today's marketplace. We believe that many plan sponsors, providers and consultants follow such an approach to disclosure today and that the current system of fee disclosure is not broken. Indeed, while the plan fiduciaries, service providers and consultants we represent agree that additional 408(b)(2) guidance could be helpful, they are concerned about the prospect of complex and burdensome new disclosure requirements. For example, new requirements that increase liability exposure or compliance costs in a significant way could lead to less choice among service providers and higher costs for plan participants. We trust the Department will weigh carefully the costs and benefits of any new requirements as part of its 408(b)(2) guidance project. The data element list we have developed is designed to cover the full diversity of services and investment products provided to defined contribution plans (often in a bundled package) and to allow meaningful comparison among and between these products, services and bundled arrangements. A list that provides useful fee disclosure regardless of the

specific investment product or service helps ensure a level playing field in the marketplace among different service providers and financial services industries. The tool also is intended to accommodate the innovations in defined contribution plan products and services that will occur over time. In developing the list of data elements, we sought to build on the Department's existing regulatory guidance and educational materials regarding 401(k) fee disclosure, including the 401(k) Plan Fee Disclosure Form, which ICI, ACLI and ABA were involved in developing in the late 1990's and which the Department makes available as a tool for plan fiduciaries. In reviewing the existing materials, we asked what additional fee-related information might be of use. For example, the 401(k) Plan Fee Disclosure Form does not call for information about the allocation of payments among service providers, although that information is now commonly provided. Therefore, our list includes data elements plan fiduciaries and service providers can use to discuss the extent to which a service provider receives compensation in connection with its services to the plan from other service providers or plan investment products (e.g., "revenue sharing" or "finders' fees"). This information will allow plan sponsors to evaluate any potential conflicts of interest that may arise in how fees are allocated among service providers. Our submission is a list of data elements to be discussed by sponsors and providers rather than a specific form on which fee information should be displayed so that plan sponsors and providers can retain flexibility with respect to the specific format in which fee information is transmitted. 1 This list is intended only as a tool for fee disclosure between plan sponsors and service providers and is not intended to address the other fee disclosure issues the Department has under review: disclosure of fee information on the Form 5500 and related schedules, and disclosure of fee information to plan participants. Robert J. Doyle July 31, 2006 Page 3 of 4 Sponsors, their consultants and service providers today make successful use of a range of fee disclosure formats and we see no reason to impair this flexibility going forward. We also believe that a data element approach can accommodate ongoing innovation in defined contribution plan products and services as well as future changes in fee structures. We tried to develop a tool that is comprehensive but not excessively detailed. The specific services on our list frequently are offered for a single price (although in some cases providers may break down services into more discrete categories and charge for these categories separately). We intend that, in using the list, plan sponsors would inquire about the scope of specific services that are included (and not included) within a particular service element and its related fee. For example, we list nondiscrimination testing as an element under compliance services but do not list the various types of nondiscrimination tests. Plan sponsors would inquire about specific aspects of nondiscrimination testing (e.g., ADP/ACP, monitoring of dollar and plan limits, making refunds of excess contributions in connection with testing failures, 410(b) coverage testing) included within a service provider's fee (or separate testing charge, if any). The list can accommodate the practice of bundling many of the specific service elements into a single product with a single fee. The service provider would not show separate charges for the various elements covered by the bundled fee but would make clear what services are included. In this regard, we hope the specificity of our list might assist plan sponsors and providers when discussing the services that are and are not included in the single bundled fee. In addition, while certain charges might be reflected under multiple data elements on our list, we have made clear that each charge should be noted only once. We strongly believe that redundant or duplicative disclosure of a service fee or product charge should be avoided as "double disclosure" will confuse rather than clarify the costs charged to the plan. We recognize that many plan sponsors seek bottom line cost or expense levels for their plans after inquiring about the specific services to be provided, the component charges for those services and any payments from third parties that may offset particular costs. For example, it is common for plan sponsors to ask for a total cost for all investment-related services and a total cost for all other (administrative)

services. Our list would not preclude the use of bottom line cost figures and could assist in discussions about such costs. We believe the role for the list of data elements we submit today is as a reference tool for plan sponsors and service providers to use in complying with their responsibilities under 408(b)(2).<sup>2</sup> This new tool, which has been developed by the private-sector, could be used in conjunction with, and as a complement to, the additional guidance the Department will issue under 408(b)(2). To that end, we intend to publicize and distribute the list within our respective memberships and encourage its use among our member companies. To facilitate its broadest possible use, we urge the Department to make the list available on its website and to include it in its fiduciary education materials in order to indicate to sponsors and providers the role that the list can play as a compliance tool. We believe that communication regarding the various fees contained on our list is one of a number of ways for plan sponsors and service providers to meet their disclosure

2 Should a glossary of relevant terms be regarded as a helpful adjunct to the data element list, we would be pleased to discuss how such a glossary might be developed. Robert J. Doyle July 31, 2006 Page 4 of 4 and information-exchange responsibilities under 408(b)(2) and we request that the Department confirm this view. We want to make clear that we do not intend for this list to be incorporated as a requirement into the new 408(b)(2) regulations. We appreciate your consideration of our submission in connection with your upcoming guidance under 408(b)(2). We would be pleased to meet with you to discuss these matters in greater detail and will follow up by phone in the near future. Please feel free to contact any of the individuals and organizations listed below. Sincerely, Mary D. Podesta Jan Jacobson Senior Counsel, Pension Regulation Director, Retirement Policy Investment Company Institute American Benefits Council Ann B. Cammack Lisa J. Bleier Senior Vice President, Taxes and Retirement Security Senior Counsel American Council of Life Insurers American Bankers Association Liz Varley Vice President and Director, Retirement Policy Securities Industry Association Enclosure cc: Ann L. Combs, Assistant Secretary, EBSA Bradford P. Campbell, Deputy Assistant Secretary for Policy, EBSA Alan D. Lebowitz, Deputy Assistant Secretary for Program Operations, EBSA Lou Campagna, Fiduciary Interpretations and Regulations Division Chief, EBSA John J. Canary, Reporting and Disclosure Division Chief, EBSA

**DATA ELEMENTS RELATED TO DEFINED CONTRIBUTION PLAN FEE DISCLOSURE**

**1 ONGOING/RECURRING FEES**

**2 INVESTMENT PRODUCT FEES**

**3 PLAN ADMINISTRATION EXPENSES**

**COMPLIANCE SERVICES**

- Nondiscrimination testing (specify tests included in this fee as well as distinct fees for particular tests or corrective actions)
- Compliance notices/education required by law (e.g., 402(f) rollover notices, 401(k) safe harbor notices)
- Form 5500 services (specify level of service – e.g., partially completed 5500 versus a signature-ready 5500)
- Annual financial audits
- Compliance/operating audits
- Plan document and amendment fees (specify services and amendments included)
- Determination letter fee
- Sarbanes-Oxley (SOX) charges (including drafting and distributing SOX-related notices to participants)
- Other (specify)

**PARTICIPANT EDUCATION, ADVICE AND ONGOING COMMUNICATION**

- General plan administrative/recordkeeping fee
- Daily valuation
- Payroll processing
- Balance inquiries
- Contract administration charge
- Distribution processing
- Required minimum distribution processing
- Hardship determination/processing
- QDRO determination/processing
- Check processing and tax

reporting • Wiring fees for distributions • Other (specify) • Participant statements • Plan sponsor reports (including information on the number and type of reports included in the fee) • Telephone/voice response unit (VRU) services • Internet services • Responding to participant benefit claims and disputes • Roth features • Automatic rollover services/products • Automatic enrollment/escalation fees • Proxy services (if not otherwise covered) • Postage • Other (specify) • Producing and distributing participant communications and education materials (specify materials and communications included, such as foreign language translations, enrollment and distribution packages, prospectuses, etc.) • Participant education meetings (including meeting frequency) • Investment advice programs (specify means of advice delivery) • Other (specify)

**LOAN ADMINISTRATION**

**INVESTMENT-RELATED CONSULTING SERVICES** • Investment management fees • 12b-1 or shareholder servicing fees • Transfer agent fees • Sub-accounting fees • Wrap fees (specify the fees classified as wrap fees) • Mortality risk and administrative expense (M&E) fee • Guaranteed product rates • Other insurance or annuity product fees • Pricing charges for specialty asset classes (including publicly and nonpublicly traded assets) • Sales charges/front-end loads • Managed account fees • Brokerage window charges • Servicing fees • Commissions/transaction fees • Commingled/pooled fund charges • Unitization • Accounting • Other (specify) • Employer stock • Purchase and sale transaction costs • Administrative fees (such as valuation) • Trustee fees • Transfer agent fees • Other (specify) • Other basis point fees • Other (specify) • Loan origination fee • Loan processing fee • Loan maintenance and repayment tracking fee • Other (such as loan payroll period conversion charges; specify other) • Performance reporting on investments • Investment selection and monitoring costs • Other (specify)

**FEES ASSOCIATED WITH PARTICIPANTS TRANSFERRING ACCOUNT BALANCES BETWEEN INVESTMENT OPTIONS**

**TRUSTEE/CUSTODIAL SERVICE FEES SPECIFIC TO CUSTODY OF PLAN ASSETS**

**OTHER ONGOING CONSULTING SERVICES** • Back-end loads (including contingent and noncontingent deferred sales charges) • Redemption fees • Surrender charges • Other (specify) • Certified annual trust statement • Safekeeping of plan assets • On-line access for plan sponsor to trust system • Fund accounting (“NAV”) • Other (specify) • Independent fiduciary reviews • Other (specify)

1 While certain fees might be reflected under multiple data elements, each should be counted only once. 2 In many cases, a bundled fee may be charged for part or all of the services listed on this chart and provided to the plan. 3 Some of the investment product fees listed herein are common to many investment products, while others relate only to specific investment products. If a mutual fund expense ratio is disclosed, explain what fees it includes. If alternative share classes or options for a particular investment product are available (e.g., retail and institutional share classes), provide information for each.

**DATA ELEMENTS RELATED TO DEFINED CONTRIBUTION PLAN FEE DISCLOSURE, CONT.**

**RECEIPT OF PAYMENTS FROM UNAFFILIATED AND AFFILIATED PARTIES**

**PAYMENTS RECEIVED BY PLAN SERVICE PROVIDERS FROM UNAFFILIATED PARTIES IN CONNECTION WITH SERVICES TO THE PLAN**

**PAYMENTS RECEIVED BY PLAN SERVICE PROVIDERS FROM AFFILIATES IN CONNECTION WITH SERVICES TO THE PLAN** • Identification of unaffiliated party • Estimate or amount of payment (including estimate calculation methodology) • Source and nature of payment, such as: • Form of payment (e.g., commissions, sub-transfer agent fees, 12b-1 fees, sub-advisor investment management fees, distribution and marketing fees, finders’ fees and consulting fees) • Whether the payments will be retained by the provider or used to offset other charges to the plan • Identification of affiliate • Whether the payment received by the service provider from an affiliate has any impact on the aggregate revenue received by the firm in connection with services to the plan • Source and nature of payment (to the extent such information is not proprietary), such as: • Form of payment (e.g., commissions, sub-transfer agent fees, 12b-1 fees, sub-advisor investment management fees, distribution and marketing fees, finders’

fees and consulting fees) • Whether the payments will be retained by the provider or used to offset other charges to the plan • Whether the payments will be based on a flat rate, percentage of assets under management or some combination • Whether the payments will be based on a flat rate, percentage of assets under management or some combination

**ONE TIME/SPECIAL FEES AND EXPENSES** • Start-up/conversion education and communication expenses • Start-up/conversion enrollment expenses • Start-up/conversion plan document fee/filing fee • Auto-enrollment set-up fees • Installation fee • Service provider termination charges • Service contract termination charges •

Adding/substituting/swapping investment options • Special event-driven participant education/communications not included in general participant education charge • Plan-related expenses associated with mergers, acquisitions and divestitures • Consulting services • Plan service provider search process • Other (specify) • Investment product termination fees and charges (for removing an investment option from the plan) • Contract termination charges • Product termination fees and/or market value adjustments • Back-end loads (including contingent and noncontingent deferred sales charges) • Other (specify) • Other (specify)

**FLOAT REVENUE** • If a service provider will receive revenue from short-term investment of plan assets (“float”), provide the information set out in Field Assistance Bulletin 2002-3, including: • Circumstances under which float may be earned • Estimate of float (including estimate calculation methodology)

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