

Congress of the United States

Washington, DC 20515

September 8, 2008

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CHAIRMAN'S
CORRESPONDENCE UNIT

VIA FACSIMILE: 202-219-5526

The Honorable Bradford Campbell
Assistant Secretary
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, NW, Suite S-2524
Washington, D.C. 20515

Dear Assistant Secretary Campbell:

We are writing to comment on the Department of Labor's proposed rule, issued on July 23, 2008, regarding "Fiduciary Requirements for Disclosure in Participant-Directed Individual Account Plans." The proposed rule requires the disclosure of certain plan and investment-related information, including fee and expense information, to participants and beneficiaries in participant-directed individual account plans.

Americans are concerned about their retirement security. This concern arises from workers' precarious access to retirement plans and, where access is available, an uncertainty regarding whether such plans will provide sufficient income in retirement. As traditional pensions are being replaced by do-it-yourself 401(k)-type retirement plans, national policymakers, new challenges in assuring retirement security for the American people. Congress and the Department must assure that the burdens placed on employees and employers to save for retirement are reasonable. With respect to the regulations at hand, employees need clear information to make informed decisions. Further, employers need clear rules to assist them with compliance.

The Department is to be commended for finally taking preliminary steps to improve the amount and type of information provided to both employees and employers. These regulations must be but one small part of the Department's efforts to regulate and monitor the suitability of information provided to participants and beneficiaries.¹

The following are our specific comments on the proposed regulations:

The Department should ensure that all key terms are understandable and explanations are provided to participants. The shift to do-it-yourself retirement plans such as 401(k) plans requires a regulatory shift as well. Policymakers cannot assume that workers, who previously

¹ Regrettably, the Department's efforts to improve information provided to workers, employers and the public as part of the annual report (form 5500) and the reasonable compensation requirement (section 408(b)(2)) failed to require that financial service firms provide accurate and adequate information on service provider compensation. These other proposals have not yet gone into effect and Congress will closely monitor whether the information provided is understandable and useful.

did not have responsibility for investing their retirement funds, understand investment industry terminology. A first and critical step in enabling workers to make prudent retirement investing decisions is to make sure they have sufficient understanding of all key terms. The Department's proposed rule uses many industry terms that may not be understandable to the typical participant, such as "turnover," "benchmark," and "passive." As another example, the Department uses the term "average annual total return" but does not indicate the extent to which return is net of fees (instead, the Department refers the participant to the SEC Form N-1A—the definition). The Department must ensure that all terms are understandable to the average participant and provide accurate explanations of technical terms as necessary. To do this, the Department and employers should test all proposed forms with actual workers and retirees.

Workers should receive all information in two simple places – the summary plan description and the quarterly pension benefit statement. The Department's proposed rule envisions that most plan information will be provided to workers in two main types of documents – a general information document and a quarterly benefit statement. However, the proposed rule would permit employers to use any of a variety of documents and formats. The Department needs to provide stronger guidance to employers on the specific documents that must be provided to workers. Workers generally only know of two documents they receive from their employers – the summary plan description and their quarterly benefit statement. The Department should be clear that all required information should be provided comprehensively in these two documents. Uniformity and clarity are critical components to ensure that employers provide information that workers understand.

Workers' quarterly statements must accurately detail all significant expenses subtracted from participant accounts. The Department's requires employers to provide periodic statements, preferably on a quarterly basis to participants. Generally, the benefit statement is the only participant-specific document a participant receives, and it is the only document alerting them to the adequacy or inadequacy of their retirement savings. The benefit statement is critical since it is the document participants are most likely to closely scrutinize.

The proposed rule only makes one change to the current requirements – the disclosure of administrative fees and individual account fees that are subtracted from a participant's account. This proposal is problematic for three reasons. First, these charges are not the most significant charges subtracted from a worker's account. According to the Government Accountability Office (GAO), these charges likely represent less than 20% of the charges assessed. The largest charge is the investment management fee. The Department's proposal distinguishes between administrative fees and investment management fees but only requires disclosure of administrative fees on the benefit statement. Participants will not understand this distinction and are likely to be confused by the separation of fees and charges into two separate documents and

in two different formats. Since both administrative fees and investment management fees are critical to investment decisions, both types of charges should be disclosed and explained on the benefit statement. There are several ways that investment management charges can be noted in individual benefit statements and the Department should select a manner that is understandable to both workers and employers.

The second reason this proposal is problematic is that failing to require disclosure of both administrative and investment management fees on the benefit statement would be misleading to participants. If a worker receives a document that specifically describes administrative and individual charges and does not describe any other charge, then many workers would infer that those are the only charges. It would seem such an approach would violate a fundamental tenet of the Employee Retirement Income Security Act (ERISA), which states -- that it is a breach of fiduciary duty to mislead participants. The Department has an obligation to ensure that the information provided to participants is accurate and not misleading.

Finally, the Department's proposal would have the unintended effect of encouraging employers and service providers to include administrative charges in the expense ratio or similar investment charge in order to avoid the administrative charge disclosure requirement. If for any reason an employer or service provider did not want to disclose the administrative charges, they could simply hide it in the investment management charge. Such a result would harm participants as it would encourage their administrative expenses to rise as their accounts rose without any increase in services provided. The Department would, unintentionally, be encouraging employers and service providers to "bundle" their services. The Department also must take separate action to educate employers that inclusion of administrative and similar fixed charges within investment management charges requires additional fiduciary oversight to ensure that such charges are regularly re-negotiated (otherwise these charges will continually rise as contributions and assets accumulate, even though services rendered do not increase).

The proposed model comparative chart must include all charges that may be charged to participant accounts and must not be misleading. The Department proposes that participants be provided basic plan information and a comparative chart before being required to make retirement investment decisions. While this information is an important step in the right direction, all key information must be contained in these documents. In particular, participants must be adequately informed about all fees and expenses by which their accounts may be reduced. It is unreasonable to expect participants to have to search through other documents to find these charges, particularly the benefit statement which they would not receive until after they have made an investment decision. The proposed rule discusses "operating expenses" and "shareholder type fees," but the Department should be clear that all fees that may be charged against a participant's account must be noted on the chart. Also, if investment management charges include other fees, such as administration and brokerage commissions, these charges must be disclosed on the chart. To do otherwise is to confuse and mislead participants. If an

employer is not certain that a service provider has disclosed all charges, the employer should test workers' opening and closing account balances against the provider's disclosed charges and returns to check if all charges have been disclosed.

The comparative chart should require the consistent use of long-term returns over one, five, and ten-year returns. Three time periods should not be overwhelming to participants and longer-term returns more accurately reflect historical experience.

The Department should not assume that SEC rules are appropriate for retirement plans.

The Department and the Securities Exchange Commission (SEC) are two separate agencies with two separate missions. The SEC's mission is to establish rules of the road by which shareholders may protect themselves. Mutual funds are required to disclose certain information and investors buy at their own risk. The Department's mission under ERISA is different. The Department's responsibilities are to assist "employers and employee benefit plan officials in understanding and complying with the requirements of ERISA as it applies to the administration of employee retirement, health and other welfare benefit plans."² Section 404 of ERISA requires employers to operate retirement plans "prudently" and "solely in the interest of participants." Employers and the Department serve a protective role to maximize workers' retirement security.

The SEC has issued a proposed rule on summary prospectuses. We separately filed comments with both the SEC and DOL expressing concerns that such summaries would not be understandable to employer-based retirement plan participants (attached). The SEC proposed rule contained some information not relevant to employer provided retirement plans. It also is based on "fund" information which may vary greatly from "plan" information that would be relevant to participants. Again, the Department's rule must require employers only to provide information relevant to its plan (otherwise workers will be confused and misled).

Also, the Department's proposed rule primarily focused on disclosure of mutual fund prospectuses and summary prospectuses. The rule only referenced other important financial documents such as the Statement of Additional Information if the plan received the document. However, this information is typically only provided on request. If employers do not know about this information, they do not know to request it. That is why the Department should focus on requiring service providers to provide all information that could affect participant accounts and not rely on SEC documents that may be inappropriate and incomplete.

Of course, the Department should have a close and ongoing relationship with the SEC, but too heavy a reliance on SEC requirements is inappropriate.

² U.S. Department of Labor-Employee Benefits Security Administration. "Compliance Assistance." Available at http://www.dol.gov/ebsa/compliance_assistance.html. August 29, 2008.

All information should clearly state who prepared the information.

The Department's proposed rule discusses two key types of information that participants would receive – a comparative chart and quarterly statements. Both documents should clearly identify the entity that prepared the information and provide contact information detailing to whom and how participants should direct questions. A recent GAO report found that employers and service providers were often not clear about which party was a fiduciary and the Department's new disclosure requirements should prevent any confusion for workers and employers by making it clear which party is responsible for preparing disclosure documents and providing assistance to participants.³

The Department's proposed rule must be part of a comprehensive regulatory and oversight effort to ensure that accurate information is provided in a form and manner that is readily understandable. The Department must regularly review the information provided by a sample of employers to determine what information is typically provided to employees. The Department should also conduct annual surveys of participants to determine the usefulness of information they receive.

The Department's proposal assumes that most employees will have access to the information required primarily through the internet. The Department needs to be certain that this method works. While it is easier for employers and service providers to simply put data on an electronic record, it has not been demonstrated that participants benefit from this trend. Many workers would never receive a single document unless they affirmatively acted to retrieve it. Younger workers may be more comfortable with the internet, but older and less-skilled workers may need printed documents.

The Department's proposal permits information to be provided in different documents and in multiple formats (such as dollars or formulas). This undermines the Department's stated goal of improving disclosure to participants. If participants have to search out information in multiple locations and formats, most will not succeed. Requiring some charges in one form and others in another not only makes it confusing for participants, but also forces them to retain multiple documents and read them together. Employers and service providers have far better ability and capacity to ensure that the required information is provided in a single place and format. Employers should be required to present information in consistent terms unless there is a compelling reason that information cannot be so provided.

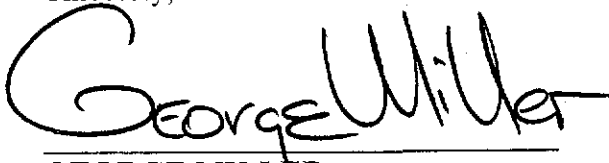
The proposed rule should also not weaken the types of information provided to workers covered under so-called 404(c) plans. Employers who seek limited liability protections under section 404(c) of ERISA should be subject to a higher standard of care than are employers who do not seek a lesser standard of liability.

³ United States Government Accountability Office. "Private Pensions: Fulfilling Fiduciary Obligations Can Present Challenges for 401(k) Sponsors." GAO-08-774. July 2008.

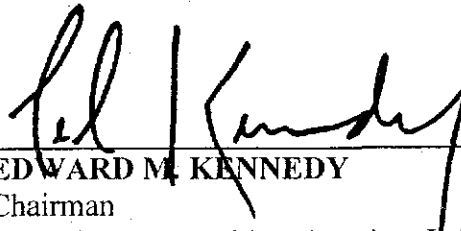
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We appreciate the hard work that the Department undertook to develop these regulations. We hope that this will be the beginning of a long-term effort by the Department to examine the current operation of retirement plans – both defined benefit and defined contribution – and take additional actions as needed to update the regulation of these critical benefits.

Sincerely,



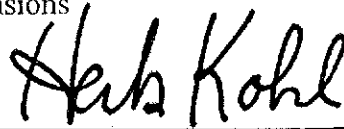
GEORGE MILLER
Chairman
Committee on Education and Labor



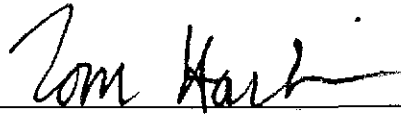
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Chairman
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TOM HARKIN
Senator
Committee on Health, Education, Labor, and Pensions

cc: The Honorable Christopher Cox, Chairman, U.S. Securities and Exchange Commission