



AMERICAN BENEFITS

COUNCIL

FILED VIA EMAIL

Rule-comments@sec.gov

Nancy M. Morris
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-9303

Re: Comment letter proposed amendments to redemption fee rule;
File Number S7-06-06.

Dear Ms. Morris:

The American Benefits Council (the Council) appreciates the opportunity to provide comments on the proposed amendments to the final redemption fee rule recently adopted by the Securities and Exchange Commission (SEC). The Council is a public policy organization representing principally Fortune 500 companies and other organizations that assist employers of all sizes in providing benefits to employees. Collectively, the Council's members either sponsor directly or provide services to retirement and health plans that cover more than 100 million Americans. We are keenly interested in this issue, primarily from the perspective of companies that sponsor retirement programs on behalf of their employees and retirees.

The Council commends the SEC for its efforts to protect mutual fund investors and to restore investor confidence in mutual funds while at the same time making efforts to protect the interests of retirement plan participants and others who trade mutual funds through intermediaries. The Council recommends that these latter efforts be enhanced by the following additional actions by the SEC: (1) delay the effective date to allow sufficient time for implementation, (2) modify the proposed rule applicable to situations where funds and intermediaries have not yet reached an agreement, (3) provide uniform standards for implementation of the rule's requirements, (4) direct assurance that information provided by intermediaries can be used for no other purpose by fund companies, and (5) seek input from the Department of Labor (DOL) on the interaction of the rule's requirements with fiduciary liability protection under

Section 404(c) of the Employee Retirement Income Security Act of 1974, as amended (ERISA).

Delayed Effective Date

The redemption fee rule is currently scheduled to take effect on October 16, 2006. For retirement plans and their service providers, much activity will be required for implementation. Prior to the effective date, plan service providers are required to have agreements in place with all of the funds used by their client plans, and must be able to provide the funds with requested identity and transaction data, as well as to impose trading restrictions on participants identified by the fund as engaging in market-timing activity. Significant work will be required to put all of this in place, and service providers will simply not have enough time if implementation is required by October 16.

The Council understands that more than one business group has been developing standardized data reporting that would allow intermediaries to provide identity and transaction information to the funds upon their request.¹ Without guidance from the SEC standardizing the reporting process, plan service providers (intermediaries) and funds will choose among various competing standards. Some intermediaries may be forced to develop more than one system as various funds choose alternative formats. The service providers will analyze and design the systems modifications needed to support the data exchange under one or more formats – a process that will be expensive and time consuming. If the systems are developed by a third party, more time will be needed to test the new system before implementation on actual accounts. It is highly unlikely that all of this activity can take place prior to October 2006.

Plan service providers, who are generally first-tier intermediaries, will also be required under the proposed rule to enter into contracts with the fund or lose the ability to trade with the mutual fund company. The Council's concerns in this area are discussed in more detail below. However, it should be noted that negotiating contracts takes additional time and many of these plan service providers work with hundreds of fund companies. Trade organizations representing plan service providers have developed model agreements while organizations representing funds have developed their own models.² Even parties starting with model language from relevant trade organizations will need

¹ The Council understands that a committee of the NSCC and the Investment Company Institute (ICI) recently completed work on developing a Standardized Data Reporting program and similar work has been done by the Society for Professional Administrators and Recordkeepers (SPARK) Institute.

² The SPARK Institute has developed a sample contract. The Securities Industry Association (SIA) and ICI have jointly developed contractual clauses intended to assist their members in meeting the written agreement requirement.

to work out their differences and anyone who has ever been involved in contract negotiations between funds and intermediaries knows this is a time-consuming process. The trade organizations represent divergent interests so reconciling the positions of the respective parties could be particularly challenging. With potentially hundreds of contracts to work through, it is unlikely that this requirement could be met by the anticipated implementation date.

Additional activities such as revising web sites, reprogramming telephonic voice response systems, retraining call center personnel, revising plan documents and developing participant communication materials will also need to occur. Because of the possibility of changes in the updated regulations, some companies are hesitant at this point to even begin the process of updating agreements, etc. fearing they will have to repeat their efforts once the final regulations are issued. Therefore, October is not a realistic implementation date.

In contrast to the companies that are waiting so they do not need to duplicate efforts, other companies, concerned about the impending deadline, have committed considerable resources toward compliance even though they are aware that some of those resources may be wasted if the rule changes. If the SEC decides to extend the deadline, the Council recommends that the SEC announce the delay as soon as possible (even before finalizing any other changes to the regulations) so that companies can reassess their implementation timelines on a more considered basis.

Lack of Contract Severely Penalizes Intermediaries

For the first time, the proposed rule would require that a fund that does not have a contract with a particular intermediary to cut off the intermediary from access to purchasing the securities issued by the fund. The Council believes this result is unduly onerous on the intermediaries and unfairly places the burden of obtaining a contract on the intermediaries. If the intent of the rule is to prohibit market-timing activity, this result could be achieved by treating the first-tier intermediary in the same manner as proposed for second- (and lower-) tier intermediaries. First-tier intermediaries would be required, without an agreement in place, to provide shareholder and transaction information upon the request of the fund.³ If the intermediary fails to provide the requested information, the fund will prohibit the first-tier intermediary from purchasing additional shares.

³ The Council recommends that the SEC's final rule place reasonable restrictions on requests for information that can be made. For example, it would not make sense for an intermediary to provide the same information more than once. In addition, some type of limitation on frequency, such as once-per-month, would alleviate potentially continuous requests for information.

Alternatively, at the very least the final rule could preclude an intermediary without an agreement from redeeming shares within seven days (applied at the participant level). This would be a better alternative than restricting any further purchases by the intermediary. This approach appeared to be the intent of the original final rule, although it was subject to interpretation.

Uniformity

As the Council stated in our comment letters dated May 10, 2004, and May 9, 2005, many retirement plans and their service providers have asked for uniformity in order to reduce the costs of implementation, insure consistency of administration, and communicate changes to participants without confusing them. The Council recommends that the uniform standards cover the types of transactions to which the fee will be applied, a standardized format to be used to provide requested information on participant trades to fund companies, and other areas detailed in the Council's letter dated May 9, 2005.

Privacy Concerns

The Council also recommends that the SEC specifically preclude the use of information attained by the funds under the requirements of the regulation for marketing or other purposes unrelated to the imposition of the redemption fees. Both the final regulation and the proposed amendment indicate that other laws would preclude the fund from using the information for its own marketing purposes unless it is permitted under the intermediary's privacy policy. However, a direct prohibition in the rule itself would clarify that the information cannot be used for any other activities, regardless of the existence or scope of any privacy policies of the fund.

ERISA Section 404(c) Protection

Some plan sponsors are concerned that trading restrictions or redemption fees imposed under the proposed rule would be viewed as limiting a participant's ability to direct investments and, therefore, cause the loss of fiduciary protections under ERISA Section 404(c), resulting in potential plan sponsor liability for losses associated with the restricted investment. ERISA Section 404(c) provides fiduciary liability protection for the investments selected by the participant when certain requirements are met, including the ability to change the investments as frequently as appropriate for the investment. Plan sponsors are also concerned that imposing a restriction might trigger the blackout period rules, requiring 30-day notice of a restriction.

While ERISA Section 404(c) is governed by the DOL and outside the jurisdiction of the SEC, integration of guidance between the two agencies is essential to

implementation by retirement plans and their service providers. The Council believes it would be appropriate to view the fund's unilateral right to restrict trading at the participant level as an inherent aspect of the investment, not a restriction required to be spelled out in the plan document or a decision of the plan sponsor (which would be subject to fiduciary requirements). The restriction is not a decision of the plan sponsor or a function of a plan document requirement; it is a unilateral decision of the fund. The Council recommends that the SEC consult the DOL on this issue.

We appreciate the opportunity to provide further input in the development of potential rules in this area, and to comment on such rules. We believe the Council is able to provide the important and unique perspective of employer sponsors of retirement plans, and we would be pleased to make this information and perspective available to the SEC. If additional information from us would be helpful, please call me at 202-289-6700.

Sincerely,

A handwritten signature in black ink, appearing to read "Jan Jacobson". The signature is fluid and cursive, with a long horizontal flourish extending to the right.

Jan M. Jacobson
Director, Retirement Policy
American Benefits Council