WRITTEN TESTIMONY OF BRADFORD P. CAMPBELL
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Introductory Remarks

Good morning Chairman Miller, Ranking Member McKeon, and Members of the Committee. Thank you for inviting me to discuss 401(k) plan fees, the Department of Labor's role in overseeing plan fees, and proposals to increase transparency and disclosure of plan fee and expense information. I am Bradford Campbell, the Assistant Secretary of Labor for the Employee Benefits Security Administration (EBSA). I am proud to be here today representing the Department of Labor and EBSA. Our mission is to protect the security of retirement, health and other employee benefits for America's workers, retirees and their families, and to support the growth of our private benefits system.

Ensuring the security of retirement benefits is a core mission of EBSA, and one of this Administration's highest priorities. Excessive fees can undermine retirement security by reducing the accumulation of assets. It is therefore critical that plan participants directing the investment of their contributions, and plan fiduciaries charged with the responsibility of prudently selecting service providers and paying only reasonable fees and expenses have the information they need to make appropriate decisions.

That is why the Department began a series of regulatory initiatives last year to expand disclosure requirements in three distinct areas:

1. Disclosures by plans to participants to assist in making investment decisions;

2. Disclosures by service providers to plan fiduciaries to assist in assessing the reasonableness of provider compensation and potential conflicts of interest; and

3. More efficient, expanded fee and compensation disclosures to the government and the public through a substantially revised, electronically filed Form 5500 Annual Report.

Each of these projects addresses different disclosure needs, and our regulations will be tailored to ensure that appropriate disclosures are made in a cost effective manner. For example, participants are unlikely to find useful extensive disclosure documents written in "legalese"—instead, it appears from comments we received thus far that participants want concise and readily understood comparative information about plan costs and their investment options. By contrast, plan fiduciaries want detailed disclosures in order to properly carry out their duties under the law, enabling them to understand the nature of the services being provided, all fees and expenses, any conflicts of interest on the part of the service provider, and indirect compensation providers may receive in connection with the plan's business.

We have made significant progress on these projects. We will be issuing a final regulation requiring additional public disclosure of fee and expense information on the Form 5500 within the next few weeks. A proposed regulation requiring specific and comprehensive disclosures to plan fiduciaries by service providers is currently in the clearance process, and we expect this proposal to be published this year. We also concluded a Request for Information seeking the views of the interested public on issues surrounding disclosures to participants. We are currently evaluating the comments received from consumer groups, plan sponsors, service providers and others as we develop a proposed regulation.

The Employee Retirement Income Security Act of 1974 (ERISA) provides the Secretary with broad regulatory authority, enabling the Department to pursue these comprehensive disclosure initiatives without need for a statutory amendment. The regulatory process

currently underway ensures that all voices and points of view will be heard and provides an effective means of resolving the many complex and technical issues presented. While I am pleased that we share the common goal of improving fee disclosure, I am concerned by a number of provisions in H.R. 3185, which I fear could disrupt our ongoing efforts to provide these important disclosures to workers. In addition, the legislation would fundamentally change the nature of ERISA's fiduciary oversight by mandating inclusion of Department of Labor-approved investment products, limiting the ability of workers and employers to develop plans that best suit their mutual needs. I am also concerned that the legislation may not achieve the primary goal of participant disclosures—providing workers with useful and concise information—by mandating very detailed and costly disclosure documents. Disclosures intended for participants should illuminate, not confuse—excessively detailed disclosures are likely to be ignored by participants even as those participants bear the potentially significant cost of the preparation and distribution. In addition to these concerns, there are a number of issues regarding the practicality of administering the legislation's requirements.

My testimony today will discuss in more detail the Department's activities related to plan fees. Also, I will describe the Department's regulatory and enforcement initiatives focused on improving the transparency of fee and expense information for both plan fiduciaries and participants.

Background

EBSA is responsible for administering and enforcing the fiduciary, reporting, and disclosure provisions of Title I of ERISA. EBSA oversees approximately 683,000 private pension plans, including 419,000 participant-directed individual account plans such as 401(k) plans, and millions of private health and welfare plans that are subject to ERISA.[1] Participant-directed individual account plans under our jurisdiction hold over $2.2 trillion in assets and cover more than 44.4 million active participants. Since 401(k)-type plans began to proliferate in the early 1980s, the number of employees investing

[1] Based on 2004 filings of the Form 5500.

through these types of plans has grown dramatically. The number of active participants has risen almost 500 percent since 1984 and has increased by 11.4 percent since 2000. EBSA employs a comprehensive, integrated approach encompassing programs for enforcement, compliance assistance, interpretive guidance, legislation, and research to protect and advance the retirement security of our nation's workers and retirees.

Title I of ERISA establishes standards of fiduciary conduct for persons who are responsible for the administration and management of benefit plans. It also establishes standards for the reporting of plan related financial and benefit information to the Department, the IRS and the PBGC, and the disclosure of essential plan related information to participants and beneficiaries.

The Fiduciary's Role

ERISA requires plan fiduciaries to discharge their duties solely in the interest of plan participants and beneficiaries, and for the exclusive purpose of providing benefits and defraying reasonable expenses of plan administration. In discharging their duties, fiduciaries must act prudently and in accordance with the documents governing the plan. If a fiduciary's conduct fails to meet ERISA's standards, the fiduciary is personally liable for plan losses attributable to such failure.

ERISA protects participants and beneficiaries, as well as plan sponsors, by holding plan fiduciaries accountable for prudently selecting plan investments and service providers. In carrying out this responsibility, plan fiduciaries must take into account relevant information relating to the plan, the investment, and the service provider, and are specifically obligated to consider fees and expenses.

ERISA prohibits the payment of fees to service providers unless the services are necessary, are provided pursuant to a reasonable contract, and the plan pays no more than reasonable compensation. Thus, plan fiduciaries must ensure that fees paid to service providers and other expenses of the plan are reasonable in light of the level and quality of

services provided. Plan fiduciaries must also be able to assess whether revenue sharing or other indirect compensation arrangements create conflicts of interest on the part of the service provider that might affect the quality of the services to be performed. These responsibilities are ongoing. After initially selecting service providers and investments for their plans, fiduciaries are required to monitor plan fees and expenses to determine whether they continue to be reasonable and whether there are conflicts of interest.

EBSA's Compliance Assistance Activities

EBSA assists plan fiduciaries and others in understanding their obligations under ERISA, including the importance of understanding service provider fees and relationships, by providing interpretive guidance[2] and making related materials available on its Web site. One such publication developed by EBSA is *Understanding Retirement Plan Fees and Expenses*, which provides general information about plan fees and expenses. In conjunction with the Securities and Exchange Commission, we also developed a fact sheet, "Selecting and Monitoring Pension Consultants – Tips for Plan Fiduciaries." This fact sheet contains a set of questions to assist plan fiduciaries in evaluating the objectivity of pension consultant recommendations.

EBSA also has made available on its Web site a model "401(k) Plan Fee Disclosure Form" to assist fiduciaries of individual account pension plans when analyzing and comparing the costs associated with selecting service providers and investment products. This form is the product of a coordinated effort of the American Bankers Association, Investment Company Institute, and the American Council of Life Insurers.

To help educate plan sponsors and fiduciaries about their obligations under ERISA, EBSA conducts numerous educational and outreach activities. Our campaign, "Getting It Right – Know Your Fiduciary Responsibilities," includes nationwide educational seminars to help plan sponsors understand the law. The program focuses on fiduciary

[2] *See, e.g.*, Field Assistance Bulletin 2002-3 (November 5, 2002) and Advisory Opinions 2003-09A (June 25, 2003), 97-16A (May 22, 1997), and 97-15A (May 22, 1997).

obligations, especially related to the importance of selecting plan service providers and the role of fee and compensation considerations in that selection process. EBSA has conducted 20 fiduciary education programs since May 2004 in different cities throughout the United States. EBSA also has conducted 49 health benefits education seminars, covering nearly every state, since 2001. Beginning in February 2005, these seminars added a focus on fiduciary responsibilities. EBSA will continue to provide seminars in additional locations under each program.

Disclosures to Participants under Current Law

ERISA currently provides for a number of disclosures aimed at providing participants and beneficiaries information about their plans' investments. For example, information is provided to participants through summary plan descriptions and summary annual reports. Under the Pension Protection Act of 2006, plan administrators are required to automatically furnish pension benefit statements to plan participants and beneficiaries. The Department issued a Field Assistance Bulletin in December 2006 to provide initial guidance on complying with the new statutory requirements. Statements must be furnished at least once each quarter, in the case of individual account plans that permit participants to direct their investments, and at least once each year, in the case of individual account plans that do not permit participants to direct their investments. Other disclosures, such as copies of the plan documents, are available to participants on request.

Additional disclosures are required by the Department's rules concerning whether a participant has "exercised control" over his or her account. ERISA section 404(c) provides that plan fiduciaries are not liable for investment losses which result from the participant's exercise of control. A number of conditions must be satisfied, including that specified information concerning plan investments must be provided to plan participants. Information fundamental to participants' investment decisions must be furnished automatically. Additional information must be provided on request.

EBSA Participant Education and Outreach Activities

EBSA is committed to assisting plan participants and beneficiaries in understanding the importance of plan fees and expenses and the effect of those fees and expenses on retirement savings. EBSA has developed educational brochures and materials available for distribution and through our Web site. EBSA's brochure entitled *A Look at 401(k) Plan Fees for Employees* is targeted to participants and beneficiaries of 401(k) plans who are responsible for directing their own investments. The brochure answers frequently asked questions about fees and highlights the most common fees, and is designed to encourage participants to make informed investment decisions and to consider fees as a factor in decision making. Last fiscal year, EBSA distributed over 5,400 copies of this brochure and over 46,000 visitors viewed the brochure on our Web site.

More general information is provided in the publications, *What You Should Know about Your Retirement Plan* and *Taking the Mystery out of Retirement Planning*. In the same period, EBSA distributed over 86,000 copies of these two brochures and almost 102,000 visitors viewed these materials on our Web site. EBSA's *Study of 401(k) Plan Fees and Expenses*, which describes differences in fee structures faced by plan sponsors when they purchase services from outside providers, is also available.

Regulatory Initiatives

EBSA currently is pursuing three initiatives to improve the transparency of fee and expense information to participants, plan sponsors and fiduciaries, government agencies and the public. We began these initiatives, in part, to address concerns that participants are not receiving information in a format useful to them in making investment decisions, and that plan fiduciaries are having difficulty getting needed fee and compensation arrangement information from service providers to fully satisfy their fiduciary duties. The needs of participants and plan fiduciaries are growing as the financial services industry evolves, offering an increasingly complex array of products and services.

- Disclosures to Participants

EBSA currently is developing a proposed regulation addressing required disclosures to participants in participant-directed individual account plans. This regulation will ensure that participants have concise, readily understandable information they can use to make informed decisions about the investment and management of their retirement accounts. Special care must be taken to ensure that the benefits to participants and beneficiaries of any new requirement outweigh the compliance costs, given that any such costs are likely to be charged against the individual accounts of participants.

On April 25, 2007, the Department published a Request for Information to gather data to develop the proposed regulation. The Request for Information invited suggestions from plan participants, plan sponsors, plan service providers, consumer advocates and others for improving the current disclosures applicable to participant-directed individual account plans and requesting analyses of the benefits and costs of implementing such suggestions. The Department specifically invited comment on the recommendation of the Government Accountability Office that plans be required to provide a summary of all fees that are paid out of plan assets or directly by participants, as well as other possible approaches to improving the disclosure of plan fee and expense information.

In connection with this initiative, EBSA is also working with the Securities and Exchange Commission to develop a framework for disclosure of information about fees charged by financial service providers, such as mutual funds, that would be more easily understood by participants and beneficiaries. Improved mutual fund disclosure would assist plan participants and beneficiaries because a large proportion of 401(k) plan assets are invested in mutual fund shares. We are working closely with the SEC to ensure that the disclosure requirements under our respective laws are complementary.

We are hopeful that improved fee disclosure will assist plan participants and beneficiaries in making more informed decisions about their investments. Better disclosure could also

lead to enhanced competition between financial service providers which could lead to lower fees and enhanced services.

- Disclosures to Plan Fiduciaries

EBSA will shortly be issuing a proposed regulation amending its current regulation under section 408(b)(2) to clarify the information fiduciaries must receive and service providers must disclose for purposes of determining whether a contract or arrangement is "reasonable," as required by ERISA's statutory exemption for service arrangements. Our intent is to ensure that service providers entering into or renewing contracts with plans disclose to plan fiduciaries comprehensive and accurate information concerning the providers' receipt of direct and indirect compensation or fees and the potential for conflicts of interest that may affect the provider's performance of services. The information provided must be sufficient for fiduciaries to make informed decisions about the services that will be provided, the costs of those services, and potential conflicts of interest. The Department believes that such disclosures are critical to ensuring that contracts and arrangements are "reasonable" within the meaning of the statute. This proposed regulation currently is under review within the Administration.

- Disclosures to the Public

EBSA will shortly promulgate a final regulation revising the Form 5500 Annual Report filed with the Department to complement the information obtained by plan fiduciaries as part of the service provider selection or renewal process. The Form 5500 is a joint report for the Department of Labor, Internal Revenue Service and Pension Benefit Guaranty Corporation that includes information about the plan's operation, funding, assets, and investments. The Department collects information on service provider fees through the Form 5500 Schedule C.

Consistent with recommendations of the ERISA Advisory Council Working Group, the Department published, for public comment, a number of changes to the Form 5500,

including changes that would expand the service provider information required to be reported on the Schedule C. The proposed changes more specifically define the information that must be reported concerning the "indirect" compensation service providers received from parties other than the plan or plan sponsor, including revenue sharing arrangements among service providers to plans. The proposed changes to the Schedule C were designed to assist plan fiduciaries in monitoring the reasonableness of compensation service providers receive for services and potential conflicts of interest that might affect the quality of those services. EBSA has completed its review of public comments on the proposed Schedule C and other changes to the Form 5500 and expects to have a final regulation and a notice of form revisions published by mid-October.

We intend that the changes to the Schedule C will work in tandem with our 408(b)(2) initiative. The amendment to our 408(b)(2) regulation will provide up front disclosures to plan fiduciaries, and the Schedule C revisions will reinforce the plan fiduciary's obligation to understand and monitor these fee disclosures. The Schedule C will remain a requirement for plans with 100 or more participants, which is consistent with long-standing Congressional direction to simplify reporting requirements for small plans.

EBSA's Enforcement Efforts

EBSA has devoted enforcement resources to this area, seeking to detect, correct and deter violations such as excessive fees and expenses, and failure by fiduciaries to monitor on-going fee structure arrangements. Over the past nine years, we closed 354 401(k) investigations involving these issues, with monetary results of over $64 million.

In carrying out its enforcement responsibilities, EBSA conducts civil and criminal investigations to determine whether the provisions of ERISA or other federal laws related to employee benefit plans have been violated. EBSA regularly works in coordination with other federal and state enforcement agencies, including the Department's Office of the Inspector General, the Internal Revenue Service, the Department of Justice (including the Federal Bureau of Investigation), the Securities and Exchange Commission, the

PBGC, the federal banking agencies, state insurance commissioners, and state attorneys general.

EBSA is continuing to focus enforcement efforts on compensation arrangements between pension plan sponsors and service providers hired to assist in the investment of plan assets. EBSA's Consultant/Adviser Project (CAP), created in October 2006, addresses conflicts of interest and the receipt of indirect, undisclosed compensation by pension consultants and other investment advisers. Our investigations seek to determine whether the receipt of such compensation violates ERISA because the adviser or consultant used its status with respect to a benefit plan to generate additional fees for itself or its affiliates. The primary focus of CAP is on the potential civil and criminal violations arising from the receipt of indirect, undisclosed compensation. A related objective is to determine whether plan sponsors and fiduciaries understand the compensation and fee arrangements they enter into in order to prudently select, retain, and monitor pension consultants and investment advisers. CAP will also seek to identify potential criminal violations, such as kickbacks or fraud.

Concerns Regarding H.R. 3185

I applaud the Chairman's concern about enhancing participant disclosure and protection in 401(k)-type plans and his efforts to highlight the importance of this issue . But while H.R. 3185 and the Department's regulatory initiatives share the common goal of providing increased transparency of fee and expense information, I am concerned that the legislation could disrupt the Department's ongoing efforts to provide these important disclosures.

- Participant Disclosure Requirements

Unlike plan fiduciaries, who require highly detailed fee, expense and conflict of interest information to carry out their duties, participants are most likely to benefit from concise disclosures that allow them to meaningfully compare the investment options in their

plans. In response to our April Request for Information, the Department received many comments highlighting the importance of brevity and relevance in disclosures to participants. For example, AARP cautioned that "To be effective, investment and fee disclosures should be short, easy to read and provide meaningful information," and cited several studies supporting shorter, more concise disclosure materials.[3]

The very detailed scope of H.R. 3185's disclosure requirements could result in many participants ignoring the complicated disclosures. For example, under the bill as introduced, the first of several disclosures participants would receive is an annual notice containing a list of specific disclosure items, including a "fee menu." The fee menu, which would list all potential fees that could be assessed, would divide all potential fees into one of three categories, and then further divide the fees within each of the three categories into one of four subcategories. Each fee within the twelve subcategories would be accompanied by a "general description of the purposes for each fee." This could result in a complex disclosure that describes literally dozens of potential fees, regardless of their relevance to the participant's decision in selecting an investment option. One tool for plan fiduciaries developed jointly by a number of financial service providers lists more than 100 different kinds of fees and expenses common to 401(k)-type plans—categorizing and describing each of these fees could result in a very lengthy disclosure document. Many commenters, in response to our Request for Information, suggested that one or more methods of aggregating fee information would provide participants with more meaningful and useful disclosure.

- Mandated Investment Options

The legislation also takes an unprecedented step by requiring the Department of Labor to approve by regulation a mandatory investment option for all participant-directed individual account plans. In addition to limiting the ability of workers and employers to develop plans that best suit their mutual needs, this provision would result in the Labor

[3] Letter from David Certner, Legislative Counsel and Director of Legislative Policy, Government Relations and Advocacy, AARP, to the Employee Benefits Security Administration (July 24, 2007), at page 9, *available at* http://www.dol.gov/ebsa/pdf/Certner072407.pdf.

Department dictating which "nationally-recognized market-based index funds" are eligible for mandatory inclusion by plans. Plan fiduciaries—accountable for their decisions and acting in a transparent, efficient marketplace—should select service providers rather than a Federal agency. Further, the criteria for eligible index funds are not defined. Funds must offer a combination of returns, risk and fees "that is likely to meet retirement income needs at adequate levels of contribution," but it is not clear from this language what standard the Department should use in determining what "retirement income needs" or "adequate levels of contribution" are.

- Provision of "Services" to Small Employers

The Department of Labor is very active in providing education and compliance assistance to plan sponsors, and focuses specifically on the needs of small employers. For example, we developed publications such as *401(k) Plans for Small Businesses, Choosing a Retirement Solution for Your Small Business, SIMPLE IRA Plans for Your Small Business,* and conduct year-round fiduciary education seminars that are particularly designed for small employers. However, the legislation goes beyond education and outreach, requiring the Department to provide "services designed to assist small employers in finding...affordable investment options." I am concerned that this provision may well conflict with the Department's duty to enforce the law, as both the plans and the service providers could be potential targets of our investigations.

While the Department has a number of concerns in addition to the three specific issues discussed above, such as the duplicative nature of the new advisory body created by the bill and the requirement to "widely disseminate" the names of certain noncompliant service providers to more than 400,000 plans and nearly 45 million participants, we will provide technical comments to the Committee addressing these issues at a later time.

Conclusion

Mr. Chairman and Members of the Committee, thank you for the opportunity to testify before you today. The Department is committed to ensuring that 401(k) plans and

participants pay fair, competitive and transparent prices for services that benefit them – and to combating instances where fees are excessive or hidden. We are moving as quickly as possible consistent with the requirements of the regulatory process to complete our disclosure initiatives, and we believe they will improve the retirement security of America's workers, retirees and their families. I will be pleased to answer any questions you may have.