American Federation of Labor and Congress of Industrial Organizations

815 Sixteenth Street, N.W.
Washington, D.C. 20006
(202) 637-5000
www.aflcio.org

September 8, 2008

Sent By E-Mail to e-ORI@dol.gov

Office of Regulations and Interpretations
Employee Benefits Security Administration
Attn: Participant Fee Disclosure Project
Room N-5644
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Re: Fiduciary Requirements for Disclosure in Participant-Directed Individual Account Plans—Proposed Regulations

Ladies and Gentlemen:

On behalf of the more than 10 million working men and women of the AFL-CIO, we offer our comments on the proposed regulations addressing Fiduciary Requirements for Disclosure in Participant-Directed Individual Account Plans issued on July 23, 2008 (73 Fed. Reg. 43014).

The labor movement has long been committed to assuring retirement income security for its members and all Americans. Today, retirement security is fast becoming a goal beyond the reach of most Americans. Our private pension system is fraying, with fewer workers now covered by defined benefit plans.

While defined benefit plans have declined over the past twenty years, the number of employer-provided individual account plans, primarily plans providing workers the opportunity for pre-tax savings under Section 401(k) of the Internal Revenue Code of 1986, as amended, has exploded—from almost 30,000 in 1985 to 436,000 in 2005.[1] Worker savings in individual account plans can and should be an important component in assuring adequate retirement

[1] The most recent data available is for 2005. *See* U.S. Department of Labor, Employee Benefits Security Administration, *Private Pension Plan Bulletin Historical Tables* (February 2008).

income. In our view, however, they should not serve as the primary source of retirement income, but can rather provide a supplement to the security provided by a traditional employer-funded defined benefit pension plan—a plan that provides a guaranteed lifetime retirement income. Individual account plans present well-recognized risk to workers and standing alone fall far short of providing true retirement security. Workers under these plans bear the entire risks of investment, adequacy and longevity—increasing the likelihood that there will be inadequate assets upon retirement to provide a sufficient income stream.

Because most individual account savings plans require participating workers to make their own investment decisions, it is crucial that workers receive appropriate, timely, and complete information and assistance, including with respect to the fees and expenses to be charged against their accounts. The proposed regulations begin to address the need for better information about plan fees and expenses, and our comments include suggestions to make the disclosure more understandable and useful to workers.

Adequacy of the Fee and Expense Information Provided

The proposal describes two broad categories of information to be provided to plan participants, plan-related information and investment expense information, and the specific information to be disclosed within each category.

Paragraph (c)(2)(i) of the proposed regulation provides for the disclosure of plan administrative expenses for legal, accounting and recordkeeping services "... to the extent not otherwise included in investment-related fees and expenses ...." In our view, excluding those administrative expenses embedded in investment-related fees and expenses is not appropriate. Service providers that offer bundled plan services, combining administrative, recordkeeping and investment management services, should give plan fiduciaries a breakdown and itemization of the fees and expenses for each category. Without that itemization, plan fiduciaries will not be able to give participants the full picture with respect to administrative expenses charged against their accounts. The failure to break apart bundled services also affects the disclosure of investment expenses, particularly if only some investment alternatives under the plan are covered by the arrangement. In those circumstances, participants will be unable to make accurate fee and expense comparisons.

We are also concerned about the scope of the fee and expense information included in the quarterly statement. The proposal requires the quarterly statement to show administrative expenses, both those plan-level expenses allocated among all participants and any expenses charged for individual services, such as loan fees (proposed §§ 2550.404a-5(c)(2)(ii) and (c)(3)(ii)). But no comparable disclosure for investment-related expenses charged against participants' individual accounts is required. This omission means plan fiduciaries would not disclose the impact of the largest expense incurred by participants.[2]

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[2] Investment fees and expenses, according to the Government Accountability Office, constitute the majority of fees for 401(k) plans. Government Accountability Office, *Changes Needed to Provide 401(k) Plan Participants and the Department of Labor Better Information on Fees*, GAO-07-21 (November 2006)

The final rule should require the disclosure of investment expenses incurred and charged to a participant's account.[3] Individual workers should not be left on their own, using the general investment-related information disclosed under paragraph (d)(iv) of the proposed regulation, to determine the investment expenses charged to their accounts. Without disclosure of the actual investment fees and expenses, the statements participants receive will be incomplete and misleading, as they will not accurately reflect all charges against their accounts. Allowing such benefit statements defeats the purpose of the disclosure requirements.

Another concern is that proposed paragraph (e)(4) allows investment-related fees and expenses to "... be expressed in terms of a monetary amount, formula, percentage of assets, or per capita charge ...." Only administrative expenses charged to a participant's account must be shown in dollar amounts. See Proposed §§ 2550.404a-5(c)(2)(ii)(A) and (c)(3)(ii)(A). Disclosing only a formula or percentage of assets charge does not illustrate how the full impact that fees may have on participants' retirement savings, particularly over several decades. The final rule should require that examples be provided, in the summary plan description or other automatically provided disclosure on investment alternatives, showing the impact of higher fees, both in the near term and on the amount ultimately available at retirement.[4]

Advance Notice

The proposal requires that plan-related and investment-related information be provided to participants and beneficiaries "... on or before the date of plan eligibility ...." (proposed §§ 2550.404a-5(c)(1) and (2) and 2550.404a-5(d)(1)). We suggest the final rule include a specific period for advance notice, such as 30 days, so that participants have sufficient time to consider the disclosed information.

We also suggest that the timing for notification of any material change in the general plan-related information required under paragraph (c)(1)(i) be modified to assure that advance notice is given to participants. Instead of the proposed "30 days after the date of adoption" included in paragraph (c)(1)(ii), the final rule should require notification at least 30 days before the effective date of the change. The best way to assure that notice is given in advance of any changes becoming effective is to require it.

Understandable Disclosures

The proposed regulation, consistent with the generally applicable rule under ERISA, requires the information provided to "... be written in a manner calculated to be understood by

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[3] At a minimum, this information should be provided at least once a year.

[4] In its November 2006 report (*supra at* n. 2), the GAO noted that a 1-percentage point fee differential amounted to 17 percent reduction in retirement savings over a 20-year period. *See also* C. Weller and S. Jenkins, *Building 401(k) Wealth One Percent at a Time: Fees Chip Away at People's Retirement Nest Eggs* (Center for American Progress 2006) where the authors show that higher fees can reduce savings by 24 to 38 percent over a 40-year career.

the average plan participant." Proposed § 2550.404a-5(e)(5). We believe, however, in this instance that the final regulations should be clearer and require explicitly that the key terms used in any required disclosure are accurately defined and explained, so that participants understand the information being disclosed.

Coordination with Other Required Disclosures

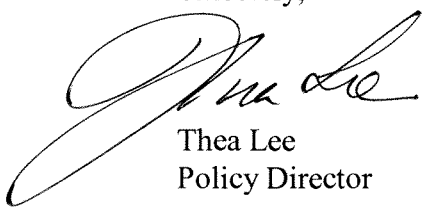
Paragraph (e)(1) of the proposed regulation allows plan-related information and administrative expense information to be provided as part of the summary plan description or the quarterly statement required under ERISA Section 105. .

While we agree that including the general plan-related information and the explanation of administrative expenses in the summary plan description is appropriate, we suggest the initial disclosure, provided when participants are first eligible, be independent of the summary plan description. A separate disclosure is required for investment-related information under paragraph (d)(1) and the information about investment alternatives and administrative expenses should not be treated differently. It may also be helpful to participants if the information about the plan, investment alternatives and expenses were presented in a single document so they do not have to search through separate documents to collect the relevant pieces of data.

Including administrative expenses actually charged against a participant's account would be an appropriate addition to the quarterly statement now mandated by ERISA Section 105 although, as noted previously, we believe that actual investment fees and expenses should also be disclosed. It also would be helpful if the Department issued the model quarterly statements, as it was directed to do under Section 508(b) of the Pension Protection Act, together with the final regulation.

We hope our comments are helpful to the Department. Should there be any questions about them or if any additional information from the AFL-CIO would be helpful, please do not hesitate to contact me at (202) 637-3907.

Sincerely,



Thea Lee
Policy Director