

July 24, 2007

Office of Regulations and Interpretations  
Employee Benefits Security Administration  
Room N-5669  
U.S. Department of Labor  
200 Constitution Avenue, N.W.  
Washington, DC 20210

**Attention: Request For Information Regarding Fee and Expense  
Disclosures to Participants in Individual Account Plans**

Ladies and Gentlemen:

On behalf of the Securities Industry and Financial Markets Association (“SIFMA”),<sup>1</sup> I write in response to the Department of Labor’s (“Department”) Request for Information regarding fee disclosure to participants and beneficiaries in participant-directed individual account plans (e.g., 401(k) plans). We applaud the Department for its efforts to provide guidance on fee disclosure to participants. Both the ERISA Advisory Council and the General Accounting Office have emphasized the importance of fee information to participants’ evaluation of their investment choices. As the ERISA Advisory Council aptly noted:

The working group agrees that disclosure to participants of factual information on investment option expenses is, in the abstract, beneficial. Nonetheless, there are practical constraints on the degree, quantity and cost of disclosures. A balance must be struck between the desire for complete disclosure and the utility of additional disclosure.

Additionally, a balance must be struck between what can reasonably be

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<sup>1</sup> SIFMA, the product of a merger between the Securities Industry Association (“SIA”) and the Bond Market Association in 2006, brings together the shared interests of more than 650 securities firms, banks and asset managers. SIFMA’s mission is to promote policies and practices that work to expand and perfect markets, foster the development of new products and services and create efficiencies for member firms, while preserving and enhancing the public’s trust and confidence in the markets and the industry. SIFMA works to represent its members’ interests locally and globally. It has offices in New York, Washington DC, and London and its associated firm, the Asia Securities Industry and Financial Markets Association, is based in Hong Kong.

expected of small plan sponsors and the potential capabilities of larger plan sponsors. The working group wants to avoid a rule that is so burdensome that it discourages the adoption and maintenance of defined contribution plans. Section 401(k) plans in particular have become popular and convenient investment vehicles for the US workforce. Disclosure rules should not be so onerous that they impede this popular and useful savings vehicle. Finally, the fee disclosure rules should be user friendly. The disclosures must be in an easy to read format that provides pertinent information for the investment decision. The disclosures must be easy to read and understand. (Footnote omitted) They must also be presented in a context of other investment information typically utilized by investors to make investment decisions. One item of information cannot be presented in a vacuum and fees must be presented with other information about the investment option.<sup>2</sup>

In addition to these stated goals, our members believe that any guidance issued by the Department should apply to participant-directed plans that intend to comply with the requirements of section 404(c) and those that do not. The goal, regardless of legal nomenclature, is for participants who are directing their investments to understand the fees and ultimate return of those investments. Whether the employer or some other fiduciary is protected from legal liability is a side issue. The policy focus should remain on participants, and what they need to know to make prudent investment decisions.

We also believe that any guidance issued by the Department needs to take into account how other plan expenses, such as recordkeeping fees or loan fees, are allocated to plan investment options and/or participant accounts. If the costs are allocated to all accounts equally or ratably, and across all investment options, we see no benefit in confusing participants by disclosing this information which should not affect their investment decisions. However, if the costs are only allocated to certain investment options (e.g., nonproprietary options offered on a bundled service provider's platform) or to certain participant accounts, the disclosure of those costs is important.

Our responses below follow each of the questions posed in the RFI, which, for your convenience, are set forth in their entirety.

## **Request for Information Disclosure of Information Relating to Plan Investment Options**

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<sup>2</sup> ERISA Advisory Council, Working Group Report on Participant Fee Disclosures, November 10, 2004.

*1. What basic information do participants need to evaluate investment options under their plans? If that information varies depending on the nature or type of investment option (options offered by a registered investment company, options offered under a group annuity contract, life cycle fund, stable value product, etc.), please include an explanation.*

We believe that a participant needs to receive meaningful information, written in plain English, for each investment option available under the plan, including: the investment objective and strategy (asset class, active or passive management style), the total costs of the option (unless irrelevant because costs are netted into the established rate of return, such as for stable value products), the principal investment risks, historical performance and any costs or restrictions at purchase or sale (commissions, front end loads, back end loads, market value adjustments, waiting period to sell, etc.).

*2. What specific information do participants need to evaluate the fees and expenses (such as investment management and 12b-1 fees, surrender charges, market value adjustments, etc.) attendant to investment options under their plans? If that information varies depending on the nature or type of option, or the particular fee arrangement relating to options (e.g., bundled service arrangements), please include an explanation.*

In order to evaluate the fees and expenses associated with the investment options in their plans, we think participants need a simple description of fees, such as those contained in the sample disclosure at point of sale for mutual funds endorsed by the National Association of Securities Dealers)<sup>3</sup>. To the extent that plan level costs such as recordkeeping, trustee or custody fees are specifically allocated to participant accounts, that fact should be disclosed for the options that are affected and accompanied by an easy to understand narrative on how the allocation works. The participant should be able to easily compare the net return of each investment option (total return minus all costs charged to participant account for this option (other than plan level costs that are equally distributed across all options)).

*3. To what extent is the information participants need to evaluate investment options and the attendant fees and expenses not currently being furnished or made available to them? Should such information be required to be furnished or made available by regulation or otherwise? Who should be responsible for furnishing or making available such*

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<sup>3</sup> NASD Mutual Fund Task Force, Profile Plus sample may be accessed at: [http://www.nasd.com/web/groups/rules\\_regs/documents/rules\\_regs/nasdw\\_013691.pdf](http://www.nasd.com/web/groups/rules_regs/documents/rules_regs/nasdw_013691.pdf)

*information? What, if any, additional burdens and/or costs would be imposed on plan sponsors or plans (plan participants) for such disclosures?*

Where mutual funds are used as plan choices, all the information needed by participants should be contained in the prospectus that they are provided as part of the requirements under section 404(c). Unfortunately, the prospectus may be dense, difficult to understand, and may cross reference other funds (as in a fund of funds structure) that will make it very difficult for the average participant to evaluate the information. As the Department is aware, the Securities and Exchange Commission (“SEC”) may give consideration to changing the prospectus delivery requirement under the securities laws and rely instead on a requirement to provide a short, easy to understand disclosure requirement at the point of sale, with the ability for the participant to request a copy of the prospectus. The Department of Labor has already provided significant relief in this area.<sup>4</sup> For other common investment vehicles such as bank collective funds, group trusts, separate accounts or insurance company products, the types of material included in participant disclosure is not necessarily consistent with the disclosure contained in a prospectus but nonetheless may provide adequate information required for the participant to choose between investment options. SIFMA does believe that it is appropriate for participants in those vehicles to receive key information about each investment option under the plan; again, however, the plan sponsor should be given flexibility to disclose the information in a manner that is deemed appropriate for its participants.

Participants should be able to review information that indicates how one investment option differs from another in terms of the fees it charges and the plan level fees allocated against it if those fees are allocated unequally. In our view, the plan sponsor bears the responsibility for making certain that participants have access to this key information.

*4. Should there be a requirement that information relating to investment options under a plan (including the attendant fees and expenses) be provided to participants in a summary and/or uniform fashion? Such a requirement might provide that: A) all investment options available under a participant-directed individual account plan must disclose information to participants in a form similar to the profile prospectus utilized by registered investment companies; or B) plan fiduciaries must prepare a summary of all fees paid out of plan assets directly or indirectly by participants and/or prepare annually a single document setting forth the expense ratios of all investment options under the plan. Who should be responsible for preparing such documents? Who should bear the*

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<sup>4</sup> See DOL Adv. Opin. 2003-11A.

*cost of preparing such documents? What are the burden/cost implications for plans of making any recommended changes?*

While we understand the appeal that uniformity of presentation suggests, we believe that participants and beneficiaries would ultimately bear these costs, and in the end, that additional cost passed on to the plan will not be worth it. Part of the expense of mutual funds is the prescribed disclosure obligation of the Investment Company Act. Requiring every other investment product to clone this disclosure is burdensome and expensive. The Department has properly recognized that prospectuses are just too voluminous and dense to be useful to participants. Any enhancements to participant disclosure should focus on helping participants compare investment options and identify key information about the investment option. The disclosure does not need to follow a prescribed, rigid format that would be burdensome for the plan sponsor to provide.

Other costs charged to the plan, such as accounting costs, custody costs, legal fees, etc., should not be disclosed to participants, unless they are deducted from participants' accounts, imposed on some, but not all investment options under the plan, or are otherwise unequally allocated across plan investment options or participant accounts. These costs have nothing to do with a participant's investment selection but are part of the cost of participating in the plan. The Department may have other reasons for wanting to make those costs more transparent to participants, but the Form 5500 is the appropriate place for that disclosure.

*5. How is information concerning investment options, including information relating to investment fees and expenses, communicated to plan participants, and how often? Does the information or the frequency with which the information is furnished depend on whether the plan is intended to be a section 404(c) plan?*

Our members' experience is that this information is provided to participants when they enroll in the plan, and is contained on websites of the recordkeeper or trustee that are dedicated to the plan. Significant changes to investment options are subsequently communicated to all participants as well. Where the plan is quite small and does not have access to such a website, it would be feasible to provide participants access to toll free numbers to ask for investment option information. It has also been our members' experience that virtually all 401(k) plans and other individual account plans which offer participants a choice of investment intend to meet the section 404(c) regulations, if subject to ERISA. However, any new guidance issued by the Department should encourage plan sponsors to provide this basic information to plan participants regardless of whether they intend to comply with the regulations under section 404(c).

*6. How does the availability of information on the internet pertaining to specific plan investment options, including information relating to investment fees and expenses, affect the need to furnish information to participants in paper form or electronically?*

Internet availability has increased dramatically in recent years. A recent study of Internet usage found that about 75 percent of households have access to the Internet in their homes.<sup>5</sup> With such high levels of penetration, it is appropriate for the Department to encourage the use of electronic access to satisfy delivery requirements. Where participants have access to the Internet, we believe that paper disclosure should be provided on a participant's request only, not required as a matter of course. A plan with Internet-based information has effectively paid for that access, and paper or electronic delivery requirements simply duplicate the cost of delivery and are redundant. Where participants do not have access to the Internet or actively choose not to use it, it is reasonable to require the plan sponsor to deliver paper copies of the disclosure.

*7. What changes, if any, should be made to the section 404(c) regulation, to improve the information required to be furnished or made available to plan participants and beneficiaries, and/or to improve likelihood of compliance with the disclosure or other requirements of the section 404(c) regulation? What are the burden/cost implications for plans of making any recommended changes?*

To the extent that additional enhancements are required for participant-directed plans and the guidance is inconsistent with the 404(c) regulations, the 404(c) regulations should be conformed to that guidance. The 404(c) regulations should not have more burdensome disclosure obligations regarding individual investment options than the disclosure guidance issued pursuant to this RFI.

*8. To what extent should participant-directed individual account plans be required to provide or promote investment education for participants? For example, should plans be required or encouraged to provide a primer or glossary of investment-related terms relevant to a plan's investment options (e.g., basis point, expense ratio, benchmark, redemption fee, deferred sales charge); a copy of the Department's booklet entitled "A Look at 401(k) Fees" ([http://www.dol.gov/ebsa/publications/401k\\_employee.html](http://www.dol.gov/ebsa/publications/401k_employee.html)) or similar publication; or investment research services? Should such a publication include an explanation of other investment concepts such as risk and return characteristics of available investment options? Please explain views, addressing costs and other issues relevant to adopting such a requirement.*

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<sup>5</sup> Three out of Four Americans Have Access to the Internet, Nielsen/NetRatings, March 18, 2004.

We strongly believe that investment education for participants should be encouraged, but not mandated. At most, plan sponsors should be encouraged to make available a list of websites, government publications and similar materials for participants who may be interested in obtaining additional information regarding investments. Plan sponsors and service providers have done an excellent job in developing materials for participants to educate themselves about retirement saving and about asset allocation. The entire framework of ERISA makes the establishment and maintenance of plans voluntary, and any additional costs imposed which are helpful but not critical to most investment decisions will eventually fall on participants who may not need or use the service, and make plans more unattractive to plan sponsors because of the increased requirements and potential liability.

### **Disclosure of Information Relating to Plan and Individual Account Administrative Fees and Expenses**

*9. What information is currently furnished to participants about the plan and/or individual administrative expenses charged to their individual account? Such expenses may include, for example: audit fees, legal fees, trustee fees, recordkeeping expenses, individual participant transaction fees, participant loan fees or expenses.*

Information regarding account specific charges that are deducted from participants' accounts in certain instances, like those related to loans or qualified domestic relations orders, is clearly disclosed to participants in SPDs or the forms provided by the plan to request those distributions. It is our members' experience that information regarding the aggregate costs associated with administering the plan and borne by the plan is generally not provided to plan participants when they are making their investment decisions. However, most plan record keepers will show deductions taken directly from participants' accounts (such as recordkeeping costs or other administrative expenses that are taken ratably from all participants' accounts) on the participant's account statement.

*10. What information about administrative expenses would help plan participants, but is not currently disclosed? Please explain the nature and usefulness of such information.*

Where the plan is obligated to pay expenses such as custody, recordkeeping, audit and legal expenses, the law is quite clear that a plan fiduciary is responsible for determining that these fees are reasonable and appropriate. This is not a decision that an individual participant can make, nor will the participant's disagreement that the plan is obligated to pay those fees (a settlor decision) or the amount of those fees (a plan fiduciary decision) change plan sponsor or vendor behavior. At most, it will suggest that

the participant has some authority or discretion in this area that he does not have. Thus, other than understanding that these fees are paid from the plan, and allocated in accordance with a stated method, no other disclosure is necessary or even helpful.

*11. How are charges against an individual account for administrative expenses typically communicated to participants? Is such information included as part of a participant's individual account statement or furnished separately? If separately, is the information communicated via paper statements, electronically, or via website access?*

As noted above, if the fees are netted from the earnings of an investment option, or are deducted from an employer profit sharing or matching contribution, it is our members' experience that these fees are not shown as a specific debit to individual accounts. However, if fees are separately deducted from participants' accounts, they are generally disclosed to participants on their statements, whether on paper, electronically, or through website access. Plan sponsors also have the ability to monitor the deductions that are being made from the plan.

*12. How frequently is information concerning administrative expenses charged to a participant's account communicated?*

The individualized amounts like loan fees are, in our members' experience, generally communicated at least quarterly (if charged to a participant's account). In some cases, they are communicated monthly.

*13. What, if any, requirements should the Department impose to improve the disclosure of administrative expenses to plan participants? Please be specific as to any recommendation and include estimates of any new compliance costs that may be imposed on plans or plan sponsors.*

As indicated above, where plan level administrative costs affect all participants ratably or equally, regardless of their investment choices, we believe that the appropriate expenses are currently communicated to participants and that no new requirements should be imposed. Additional communications are costly, and where it is the plan fiduciary that is responsible for determining the reasonableness of the fees, there is no benefit to burdening participants with this additional information. Where the fees affect different investment choices differently, we believe they should be disclosed. However, where these fees are not subject to participant review, approval or negotiation, and where they do not have a differential effect on investment choices, it is difficult to rationalize the additional cost or potential confusion.



*14. Should charges for administrative expenses be disclosed as part of the periodic benefit statement required under ERISA section 105?*

As explained in the answer to question 11, fee deduction methodology and disclosure varies between plans, based on a number of factors. We do not believe that, in all instances, these costs should be added to the section 105 required participant benefit statement.

### **General Questions**

*15. What, if any, distinctions should be considered in assessing the informational needs of participants in plans that intend to meet the requirements of section 404(c) as contrasted with those of participants in plans that do not intend to meet the requirements of section 404(c)?*

In our view, the required disclosures should not differ for participant directed plans based on whether the plan sponsor intends to or does not intend to meet the requirements of section 404(c).

*16. What (and what portion of) plan administrative and investment- related fees and expenses typically are paid by sponsors of participant-directed individual account plans? How and when such information is typically communicated to participants?*

We do not think that there is a “typical” answer to this question. Some employers agree to cover audit costs or legal costs but allow the custody and recordkeeping costs to come out of the plan, often out of 12b-1, subtransfer agency fees or the like. Generally, this information is contained in the SPD or is available upon request.

*17. How would providing additional fee and expense information to participants affect the choices or conduct of plan sponsors and administrators, and/or that of vendors of plan products and services? Please explain any such effects.*

We do not believe that the disclosure would change plan sponsor or service provider behavior. Approval of these fees is the fiduciary obligation of a plan fiduciary, and participants are not able to “disapprove” or “negotiate” these fees. Vendors and other service providers are presumably charging market rates; plan fiduciaries are responsible for determining that those charges are fair and reasonable. The fees paid to service

providers are generally detailed in the Form 5500 which is available to plan participants. That they are bearing an allocable portion of these fees is already disclosed; if they are not bearing an allocable portion of the costs, that information should be disclosed to ensure that participant investment choices are not based on misleading or incorrect information. We see no benefit in having plan participants involved in the determination of whether a plan's service providers are paid appropriately. The plan fiduciary making that decision is not bound or excused by participant comments or views on reasonable fees. Such a decision is complex and requires the ability to weigh various competing interests, a function that is most appropriate for those persons who have been delegated fiduciary duties and responsibilities to the plan as a whole.

*18. How would providing additional fee and expense information to participants affect their plan investment choices, plan savings conduct or other plan related behavior? Please explain any such effects and provide specific examples, if available.*

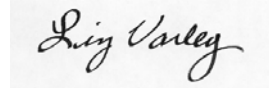
Disclosure of a plan's administrative expenses would most likely discourage some employees from saving or deferring income because he or she would not readily understand that these fees are reasonable and appropriate. Sophisticated employees' conduct would most likely not be affected; however, less sophisticated employees might well decide not to contribute to the plan because they might mistakenly believe there to be more efficient ways to save outside the plan. The amount of education required to overcome this misperception would be expensive and time consuming, since it would have to be so targeted; moreover, the additional costs might be charged to the plan in any event, further exacerbating the problem.

*19. Please identify any particularly cost-efficient (high-value but inexpensive) fee and expense disclosures to participants, and to the contrary any particularly cost-inefficient ones. Please provide any available estimates of the dollar costs or benefits of such disclosures.*

We think that the most efficient and cost-effective method of communication with participants is through the Internet, on a website dedicated to the plan. It is our members' experience that these web-based disclosures are inexpensive, can accommodate email questions and answers or display a toll-free telephone number to call for more information, and can be presented in a way that is straightforward and clear. Paper based disclosure is expensive to print and distribute, and difficult to continuously update; it is also more likely to be discarded. In-person meetings cost lost work time, may not be attended by the people most likely to have misconceptions and questions, and be expensive to organize.

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We hope that this information has been helpful, and that you will call on us if you have any further questions or if we can be helpful in any way. I can be reached at 202-216-2000.

A rectangular box containing a handwritten signature in black ink that reads "Liz Varley".

Elizabeth Varley  
Managing Director