Oral Testimony before the Employee Benefits Security Administration
On
Reasonable Contract or Arrangement under Section 408(b)(2)
Fee Disclosure (29 CFR Part 2550, RIN 1210-AB08)
March 31, 2008

[Randy]
Thank you for the opportunity to testify before you today. I am Randy Johnson, the vice president of labor, immigration and employee benefits, and I am accompanied by Aliya Wong, the director for pension policy. We are here on behalf of the U.S. Chamber of Commerce, which represents more than three million businesses and organizations of every size, sector, and region.

We appreciate the concern for greater transparency in plan fees and the effort to the address these concern. The Chamber fully supports transparency of expenses and encourages further disclosure of plan fees. We remain, however, wary of requirements that do not provide meaningful disclosure while increasing the administrative burdens on employers.

We submitted written comments on the proposed regulation under ERISA section 408(b)(2) with the ERISA Industry Committee, the College and University Professional Association for Human Resources, the National Association of Manufacturers, the Profit Sharing / 401k Council of America, and the Society for Human Resource Management. Our comments represent the concerns of plan sponsors. As we move forward, there are certain principles that we believe should be paramount in this discussion.

As more workers become dependent on individual account plans for retirement, it becomes increasingly important to provide participants with information that will allow them to make well-informed decisions. Just as importantly, employers must be aware of fees associated with the plans they are sponsoring in order to fulfill their fiduciary duties. Given the complicated nature of plan fee arrangements, it is not a simple task to discern which information and what format will prove most meaningful to either employer or participants – it will take input and dialogue from many different parties and experts. As such, our primary recommendation today is that EBSA gather further information to respond to questions and concerns that remain.

In this regard, we appreciate this hearing and the opportunity to submit comments, but sincerely believe that the process would be immeasurably helped if the Agency would hold more informal roundtable-like discussions with those to be governed by this regulation. Comments and hearings are useful but, certainly at least in my experience as special assistant for regulatory affairs here at the Department in the mid-1980s, and in other employment, there is much to be gained, and much to be learned by government regulators, by informal give and take and discussion about how things work in the "real world," and the practical problems that those who are to be regulated face when attempting to comply with a new government mandate.

Let me emphasize here that, contrary to what many may think, there is no prohibition under the Administrative Procedure Act (APA) on this kind of sharing of information and opinions in informal rulemaking, which ERISA provides for under section 505, as distinguished from formal adjudications and formal rulemaking. Forums need not be public, nor everyone involved be invited to every discussion. The agency has broad discretion to structure these meetings to gather input as it sees fit.

Indeed the courts have encouraged these types of informal discussions between the regulators and those to be regulated. In the seminal case of *Sierra Club v. Costle*[1] the court noted, reversing earlier erroneous case law, that "ex parte" communications could be considered in many instances to be beneficial when an agency issues a proposed rule:

> Oral face-to face discussions are not prohibited anywhere, anytime, in the Act...Under our system of government, the very legitimacy of general policymaking performed by unelected administrators depends in no small part upon the openness, accessibility and amenability of these officials to the needs and ideas of the public from which their ultimate authority derives, and upon whom their commands must fall...Furthermore, the importance to effective regulation of continuing contact with a regulated industry, other affected groups and the public cannot be underestimated. Informal contacts may enable the agency to win support for its program, reduce future enforcement requirements by helping those regulated to anticipate and shape their plans for the future, and spur the provision of information which the agency needs.[2]

Let me also quote briefly from a recent analysis commissioned by the Federal Energy Regulatory Commission on rules and practices on point from an article:

> Thus, the APA prohibits ex parte communications in only two types of proceedings – formal adjudications and formal rulemakings....The APA does not, however, extend that ban to informal adjudications or informal rulemakings....There is, however, no statutory prohibition on ex parte communications that applies to informal rulemaking proceedings...It would be no more appropriate to ban agency decision-makers from engaging in ex parte communications in informal rulemakings than to ban members of Congress from engaging in off-the-record conversations with constituents who are interested in a legislative proposal pending before Congress.[3]

The Employment Standards Administration recently held many in-depth, informal stakeholder meetings in its development of its recently issued proposed Family Medical Leave Act regulations. While these meetings occurred prior to the issuance of the

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[1] 657 F.2d 298, 400-410 (D.C. Cir. 1981).
[2] 657 F. 2d 298, 400 (D.C. Cir. 1981).
[3] Pierce, Richard J., Jr. "Federal Energy Regulatory Commission Ex Parte Regulations and Practices," review requested by the Federal Energy Regulatory Commission, 27 Nov 2006. http://www.ferc.gov/news/headlines/2006/2006-4/11-27-06.pdf (accessed 31 Mar 2008).

proposed regulation, this model is still useful consider following here. We recommend similar outreach and meetings with plan sponsors, mutual fund companies, third-party administrators, investment management companies, and in-house service providers to name a few examples. We believe that these meetings will go a long way toward providing information that is critical to implementing rules on plan fee disclosures that will be meaningful and useful.

[Aliya]
As you are aware, the Chamber consistently supported the completion of the regulatory process to provide guidance on plan fee disclosures. While statutory changes may later be needed to address certain issues, the regulatory process provides a critical opportunity for comment and discussion that cannot be matched in the statutory process. Even with the regulatory guidance provided thus far, there are still many questions that remain. Our written comments mention several specific areas where we believe these informal meetings and roundtables would be useful.

Our written comments suggest that the Department should establish a de minimis amount, expressed as a percentage of assets, for the reporting of investment-related fees and a materiality threshold for reporting plan services. The regulations as written could lead to situations that require the disclosure of a large number of service providers that receive compensation as the result of their relationship with a primary service provider. Informal meeting between service providers and plan sponsors could be used to determine and clarify the appropriate level of disclosure.

Our next recommendation involves the manner of the disclosure between service providers and plan sponsors. In our written comments, we stated that we do not believe that the provision of disclosures "from separate documents from separate sources" will result in adequate disclosure to all responsible plan fiduciaries. Rather, we recommend that the service provider be required to collect any required disclosures and present them in a single document, to the extent the service provider is able to get the information. In order to develop a template for this disclosure we recommend that the Department collaborate with plan sponsors and service providers. Again, informal face-to-face meetings would go a long to providing information and discourse necessary to advance this need.

Finally, we recommend further discussions concerning the term "material relationships." The requirement to disclose "material relationships" is undefined and the source of significant confusion in the retirement plan community. Convening a roundtable of interested stakeholders to vet concerns and possible solutions would contribute significantly to finding a workable solution.

In addition, there may be other areas where the Department and stakeholders could benefit from roundtables and discussions. For example:

- A discussion concerning the various relationships between plans and mutual funds to determine what disclosures are necessary.

- A conversation comparing the required disclosures under the Form 5500 and 408(b)(2) and additional issues that should be considered.
- A discussion concerning the make up of the expense ratio and whether it provides enough information for a fiduciary to determine if all fees are reasonable?

Thank you for the opportunity to provide you with these comments. I am happy to answer any questions that you may have.