September 8, 2008

Via Electronic Filing

Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5655
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, DC 20210

Attn: Participant Fee Disclosure Project

Ladies and Gentlemen:

The Investment Adviser Association[1] appreciates the opportunity to provide comments concerning the Department of Labor's proposed rule requiring that investment-related and plan administrative fee and expense information be provided to participants[2] in participant-directed individual account plans.[3] The proposal would provide meaningful disclosure of expense and other information relevant to participants' investment decisions under their plans. We commend the Department for crafting a rule that would provide fee and expense information in a format that facilitates comparison among investment options, as well as other important information participants may consider in making decisions for their retirement savings. The IAA supports this proposal, with the comments and suggested modifications discussed below.

Background

Plan participants should be provided meaningful information about the fees and costs associated with the investment options under their defined contribution plans. Such information is critical to retirement security because of the increasing percentage of participants that are covered by defined contribution, rather than defined benefit, retirement plans. Under defined contribution plans, the amount of the retirement benefits payable to a participant depends upon the level of contributions and the return on the

[1] The Investment Adviser Association is a not-for-profit association that represents the interests of SEC-registered investment advisers. Founded in 1937, the Association's membership today consists of more than 500 firms that collectively manage in excess of $9 trillion for a wide variety of individual and institutional clients. For more information, please visit our website: www.investmentadviser.org.

[2] For ease of reference, the use of the term "participant" includes both participants and beneficiaries.

[3] Fiduciary Requirements for Disclosure in Participant-Directed Individual Account Plans, 73 Fed. Reg. 43014 (2008) ("Proposal").

underlying investments of his or her individual plan account. In many such plans, the participants, rather than the plan fiduciaries, determine the specific investments in which their accounts are invested.

Plan fiduciaries still play important roles in participant-directed plans, however, in that they are responsible for selecting the "menu" of options available to participants, as well as administering the plan. Under the fiduciary responsibility provisions of ERISA, plan fiduciaries must perform these duties in a prudent fashion, and solely in the interests of participants. In addition, plan fiduciaries retain the responsibility to administer the plan, and often engage various service providers to assist in such administration.

Last year, the DOL published a request for information seeking suggestions from interested parties on a wide range of issues relating to the disclosure of plan and investment-related fee and expense information to plan participants.[4] The IAA submitted recommendations for disclosures, many of which are reflected in the current proposal.[5]

Disclosure of Plan-Related Information

The Department has proposed that participants be provided with (1) general plan information (*e.g.*, the options available under the plan and how to provide investment instructions); (2) administrative expense information (*e.g.*, annual per-participant fees); and (3) individual expense information (*e.g.*, fees charged to an individual's account based on actions taken by that individual, such as charges for a loan or investment advice). General information regarding these fees would be provided on or before an individual's eligibility for plan participation and at least annually thereafter. Information about the specific dollar amounts actually charged to a participant's account would be disclosed quarterly.

We support the Department's proposed disclosure of plan-related information, which will provide participants with an understanding of both charges that may be incurred prospectively as well as the actual amounts charged to their individual account, either through descriptions in the plan's summary plan description or as part of a pension benefit statement where appropriate.

The proposal would require identification of the total administrative fees and expenses assessed, with a description of the types of charges included in the aggregate figure, rather than require a service-by-service breakdown of such fees. We agree that it is not necessary or particularly useful to participants to have administrative charges broken out on a service-by-service basis. The Department struck an appropriate balance in this regard between providing key information that plan participants can understand without overwhelming participants with an overly detailed breakdown of charges.

[4] Fee and Expense Disclosures to Participants in Individual Account Plans, 72 Fed. Reg. 20457 (2007) ("RFI").

[5] Letter to Office of Regulations and Interpretation, U.S. Department of Labor from Karen L. Barr, Investment Adviser Association, re: Fee Disclosure RFI (July 24, 2007).

Disclosure of Investment-Related Information

The Department proposes to require disclosure of information related to each designated investment option under a plan. The information would include (1) basic identifying information (*e.g.*, category of investment option, investment management style, and web site address providing supplemental information); (2) performance data and benchmark comparisons on a one, five, and ten-year basis, if available; (3) the amount and description of fees charged directly against a participant's investments (*e.g.*, sales loads, redemption fees); and (4) total annual operating expenses (*e.g.*, expense ratio). This information must be provided in a chart or similar format that facilitates a comparison of the information for each designated investment alternative under the plan. The Department included a model safe harbor chart that plan fiduciaries could use for this purpose. The chart would have to be provided initially upon an individual's eligibility for plan participation and at least annually thereafter.

The regulation also requires certain information to be provided upon request, including copies of prospectuses or similar documents; copies of financial statements related to the options to the extent such materials are provided to the plan; a statement of the value of a share or unit of each designated alternative; and a list of the assets comprising the portfolio of each alternative which constitute plan assets and the value of each asset.

We submit the following specific comments and suggestions regarding the Department's proposed investment-related disclosures.

Content of Proposed Disclosure

We applaud the Department's recognition that imposing rules that require participants to digest large amounts of detailed investment information may be counterproductive to ensuring that they gain a better understanding of the features and costs associated with their plans and accompanying investment options. We agree that summary information is preferable to lengthy descriptions in conveying these important disclosures to plan participants. Further, the information detailed above would be accompanied by a statement indicating that fees and expenses are only one of several factors that participants should consider when making investment decisions. We particularly concur with this aspect of the proposal. Undue attention to fees to the exclusion of other factors might lead participants inadvertently to invest their entire accounts in money-market and other stable value investments in order to incur the lowest fees. Such short-term investments generally are not considered suitable as the exclusive investments for participants saving for long-term retirement needs.[6]

[6] *See, e.g.*, Default Investment Alternatives Under Participant Directed Individual Account Plans, 71 Fed. Reg. 56806, 56807 (Sept. 27, 2006) ("when such funds become the exclusive investment of participants or beneficiaries, it is unlikely that the rate of return generated by those funds over time will be sufficient to generate adequate retirement savings for most participants or beneficiaries").

We also agree that plan participants should receive details concerning charges that may be assessed directly against their accounts in connection with plan investment transactions. For example, any charges that might be triggered upon purchase or sale of a particular option (such as a commission, a contingent deferred sales charge, a surrender charge, or a market value adjustment) are relevant to a participant's assessment of the consequences of choosing a particular investment, and may affect his or her ultimate return.

Responsibility for Furnishing the Information

The Department should clarify that responsibility for furnishing the required information to plan participants rests with the plan administrator or other specifically identified fiduciary. The proposal simply states that "a fiduciary (or a person or person designated by the fiduciary to act on its behalf) shall provide…" Only the plan administrator, however, or similarly situated person, will have both information identifying the plan participants and information about each of the designated investment alternatives for a plan. The various investment option providers should not be responsible for providing information directly to plan participants, either automatically or upon request.[7]

This assignment of responsibility to the plan administrator is consistent with regulations under section 404(c), which impose the relevant disclosure responsibilities on an "identified plan fiduciary."[8] The 404(c) regulations also require provision of the name, address, and phone number of the plan fiduciary… responsible for providing the information …which may be obtained upon request."[9] Indeed, the Department's compliance assistance materials specifically reference the plan administrator as providing the required disclosures under section 404(c).[10] Placing this responsibility on the plan administrator is also consistent with reporting and disclosure obligations under other provisions of ERISA.[11]

Clarifying that the plan administrator is responsible for providing both plan-related and investment-related information to participants would also alleviate a number of practical challenges that would be otherwise raised by the proposal. As discussed below, these challenges include logistical issues related to web sites and information to be

[7] The proposed comparative chart would have to include a statement "indicating the name, address, and telephone number of the fiduciary" to contact for the provision of information to be provided upon request under proposed section 404a-5(d)(4). The Department should clarify that the fiduciary to contact for such information is the plan administrator, rather than the providers of each investment option under the plan.

[8] 29 CFR 2550.404c-1(b)(2)(i)(B).

[9] *Id.*

[10] *See Reporting and Disclosure Guide for Employee Benefit Plans (August 2006) at p. 1,* available at: http://www.dol.gov/ebsa/pdf/rdguide.pdf.

[11] *See, e.g.,* ERISA section 101(a); ERISA section 104(b) (plan administrator responsible for furnishing summary plan description to participants); ERISA section 105(a)(1) (plan administrator responsible for furnishing pension benefit statement to plan participants).

provided upon request as well as issues related to options for which only the administrator has all of the information necessary to compile the required disclosures (*e.g.* for certain separate accounts).

Specific Issues Related to Collective Investment Funds and Other Non-Mutual Fund Investment Options

The Department's proposed disclosures for designated investment options are primarily oriented toward SEC-registered mutual funds and the types of fund documents mandated by the SEC. While we truly appreciate the Department's consultation with the SEC regarding mutual fund disclosure, we note that a plan sponsor may select not only SEC-registered mutual funds as investment options for a defined contribution plan, but also a variety of other vehicles, including collective trust funds, common trust funds, commingled pools, and group trusts (together "collective investment funds"), as well as separately managed accounts. Collective investment funds are investment vehicles in which the assets of multiple retirement plans are combined and invested collectively in bank-maintained pooled trusts, subject to federal or state banking laws and regulations. Plan sponsors may also hire one or more investment managers to manage various portions of the portfolio of a separate account option, which the sponsor then unitizes at the plan level.

Collective investment funds and separate accounts are exempt from the provisions of the Investment Company Act of 1940; as a result, they can be less expensive investment alternatives to mutual funds. Imposing Investment Company Act disclosure requirements on sponsors of collective trusts and investment managers of separate accounts may increase costs for these options, which may impact competition and the availability of a wide variety of investment options to participants. Increased costs of these alternatives to plan participants could also effectively reduce the amount of retirement benefits that would be accumulated by plan participants. In addition, the proposal presents practical challenges for disclosures regarding these and other investment options because the standards set by the SEC for mutual funds are incorporated by reference into the rule.

For example, collective investment funds and separate accounts currently are not required to calculate and publish total annual operating expenses (*e.g.* expense ratios) "in the same manner as total annual operating expenses is calculated under Instruction 3 to Item 3 of Securities and Exchange Commission Form N-1A."[12] Because collective funds and separate accounts are not established and operated identically to mutual funds, their systems may not be set up to collect and process information to calculate an expense ratio that is entirely comparable to mutual fund figures. Such vehicles would require substantial lead time to develop systems to generate this information. Further, an investment manager of a separate account portfolio may not have all of the information necessary to calculate

[12] Proposed section 404a-5(h)(3). The definition of "average annual total return" also incorporates SEC Form N1-A by reference. Inclusion of SEC definitions and rules may create uncertainty regarding their application to vehicles to which they were not designed to apply. Further, it is unclear whether the DOL or SEC would be responsible for interpreting these definitions for purposes of enforcing compliance with the Department's proposed rule.

an expense ratio. That figure would have to be generated in some fashion by the plan administrator or sponsor. The Department should clarify that use of the SEC's calculation methodology applies only to mutual funds and other vehicles that are able to perform such calculations. Providers of other vehicles should be able to rely on the administrator or record keeper to perform the calculation; and the administrator or record keeper should be accorded the flexibility, if necessary, to calculate total annual operating expenses using other reasonable methodologies that are clearly disclosed.

The proposal would require provision of a web site address through which participants could access supplemental information about each investment alternative, including the investment's principal strategies, attendant risks, portfolio turnover, performance, and related fees and expenses. This information is typically available for mutual funds. It is not necessarily available, at least not to the same extent, for collective funds or other investment vehicles that are not regulated by the SEC. Such funds do not generally calculate portfolio turnover, for example. Mutual funds have more extensive SEC-mandated risk disclosures than is presented in the typical "characteristics" documents provided by collective funds to plan sponsors. Similarly, most collective investment funds and separate accounts do not maintain publicly available web sites. Creating and maintaining such a web site would impose significant costs and burdens. In addition, certain banking laws limit advertising and marketing by common trust funds such that publicly available web sites displaying certain information may not be permitted.[13] Such funds may have to set up password protected sites that are available only through the plan's record keeper.

The Department has also proposed certain information to be provided upon request that mutual funds are already required to create, but which may not have a precise corollary for collective investment funds or other vehicles. For example, it not clear what constitutes "similar documents" to a prospectus or summary prospectus in the case of collective investment funds or separate accounts. Further, unlike mutual funds, other types of funds may not publish or make available lists of portfolio holdings on a quarterly or other regular basis.[14] In addition, even information currently made available to plan sponsors by collective investment funds may not be designed with retail investors in mind, but rather are tailored specifically for the sponsor. This is entirely appropriate. Certain types of information that the Department would require to be made available to participants, such as "financial statements," are provided to assist the plan fiduciary in determining which investment options to offer to participants in the plan. The plan fiduciary retains its duty to prudently select such options even in participant-directed plans.

---

[13] *See, e.g.,* 12 CFR Section 9.18(b)(7) ("Reg 9").

[14] Along these lines, the Department should consult with the Securities and Exchange Commission to ensure that the proposal is not inconsistent with SEC rules regarding mutual fund disclosure of portfolio holdings. *See Shareholder Reports and Quarterly Portfolio Disclosure of Registered Management Investment Companies*, Release Nos.*:* 33-8393; 34-49333; IC-26372 (Feb. 27, 2004). For example, plan participants should not be able to obtain such information more frequently or as of a different date than other fund shareholders.

To address these issues, we suggest that the Department clarify that the plan administrator or sponsor may maintain supplemental information of the types already available to it for collective investment funds and separate accounts and make this information available via its own web site or the web site of a designee, such as the plan's record keeper. To the extent the plan sponsor or its record keeper does not maintain a web site, the sponsor or record keeper should be permitted to provide the supplemental information on request using other delivery methods (*e.g*. e-mail, postal service).[15] The Department should also clarify that managers or providers of investment options other than SEC-registered mutual funds should not bear liability for providing supplemental information or information upon request that differs from or is not as extensive as SEC-mandated disclosures such as prospectuses or summary prospectuses. Rather, plan sponsors should be accorded the flexibility to consider the availability of information for participants as well as the relative costs of various investment vehicles in determining which investment options to select for their plans.

Performance and Benchmark Information

The proposal would require performance data and benchmark comparisons on a one, five, and ten-year basis, if available. We support this requirement with certain additional suggestions. We appreciate that plans may provide additional performance information about each investment option, including, for example, performance since inception. This would be particularly helpful for funds in existence for fewer than 10 years. The plan sponsor may also wish to encourage participants to visit the funds' or record keepers' web sites, where available, for the most up-to-date performance information.

The proposal refers to the average annual total return of each designated investment alternative. A separate account, however, will not have actual historical returns prior to the creation of the account for a particular plan sponsor. Instead, managers generally provide plan sponsors with composite performance for separate accounts. Composite performance is calculated using the performance of all discretionary separate accounts managed to a similar style. Plan sponsors should be permitted to include such performance information in their comparative charts, clearly identified as such, accompanied by appropriate disclosures regarding the composite and what it represents.[16]

The proposal should also be modified to make clear that benchmarks should only be provided where appropriate. Certain strategies are not managed to a benchmark and therefore providing benchmark information could be misleading. Similarly, some investment strategies are managed to a custom or blended benchmark that is more appropriate for comparison purposes than a "broad-based securities market index."

[15] We understand that some small plans or record keepers may not maintain a web site.

[16] *See, e.g., Growth Stock Outlook Trust, Inc.* (April 15, 1986) (permitting mutual funds to use composite performance in the fund's prospectus during its first year of operations under certain conditions).

Electronic Delivery

We commend the DOL for permitting the use of electronic media, such as e-mail, internet and intranet communications, including relevant links to providers' websites. This approach will reduce the substantial preparation and printing costs inherent in the new disclosure rules, while also providing the most up-to-date information concerning investment options.

Effective Date

The DOL proposes that the regulation, when finalized, would be effective for plan years beginning on or after January 1, 2009. Particularly given that the comment period closes on September 8, 2008 and that the Department needs additional time to consider the comments and finalize the rule, the January 1, 2009 effective date is not feasible. The Department has invited comment on the earliest date on which the proposed regulation can or should be effective, addressing any administrative or programming costs or other issues that should be considered in establishing an effective date. We respectfully submit that the regulation should be effective for plan years beginning 18 months after the date of adoption. This implementation period is particularly necessary for collective investment funds and other non-mutual fund vehicles to create systems to generate and distribute all of the various types of information that may be required under the regulation, particularly information that is already published by SEC-registered mutual funds. These investment option providers first must set up their internal systems and then coordinate with all of the relevant record keepers to deliver the information in the various formats they request. This effort must be overlaid on all of the other implementation efforts required by recent Department initiatives (*e.g.* changes to Form 5500, Schedule C). Further, if, as is likely, investment service providers are not able to develop web sites for their vehicles in the short time frame proposed, plan sponsors will be forced to take on the significant cost and burden of developing such web sites in the interim.

Conclusion

We truly appreciate the opportunity to provide our views on these important issues. Please do not hesitate to contact me if you have any questions or would like any additional information.

Sincerely,

Karen L. Barr
General Counsel