TESTIMONY OF ROBERT G. CHAMBERS
ON BEHALF OF

AMERICAN BENEFITS COUNCIL

BEFORE THE

SUBCOMMITTEE ON HEALTH, EDUCATION,
LABOR AND PENSIONS

OF THE

U.S. HOUSE OF REPRESENTATIVES
EDUCATION AND LABOR COMMITTEE

FOR THE HEARING

on

THE 401(k) FAIR DISCLOSURE FOR RETIREMENT SECURITY ACT OF 2009

WEDNESDAY, APRIL 22, 2009

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Introduction

My name is Robert G. Chambers, and I am a partner in the international law firm of McGuireWoods LLP. I have advised clients with respect to 401(k) plan issues since 401(k) was added to the Internal Revenue Code in 1978. In that regard, my clients have included both large and small employers that sponsor 401(k) plans as well as many financial institutions that provide services to 401(k) plans. I am also a past chair of the Board of Directors of the American Benefits Council ("Council"), on whose behalf I am testifying today.

The Council is a public policy organization representing plan sponsors, principally Fortune 500 companies, and other organizations that assist employers of all sizes in providing benefits to employees. Collectively, the Council's members either sponsor directly or provide services to retirement and health plans that cover more than 100 million Americans.

The Council appreciates the opportunity to present testimony with respect to 401(k) plan fees. 401(k) plans have become a primary retirement plan for millions of Americans. Accordingly, it is more important than ever for all of us to take appropriate steps to ensure that 401(k) plans provide those Americans with retirement security. We recognize that the common goal is an effective 401(k) system that functions in a transparent manner and provides meaningful benefits at a fair price in terms of fees. We want to be as helpful to that process as possible.

The Council Supports Enhanced Disclosure Requirements

The Council supports improvement to the rules regarding plan fee disclosure. Effective plan fee disclosure <u>to participants</u> can enable them to understand their options and to choose those investments that are best suited to their personal circumstances. Disclosure to <u>plan fiduciaries</u> enables them to evaluate the reasonableness of the fees that are charged by their current provider(s) and to shop for and negotiate services and fees from other providers.

While plan fiduciaries are receiving extensive information regarding various plan services and related fees and are using that information to negotiate effectively for lower fees, we believe more can and should be done to make that process even more effective. And while service providers are providing fiduciaries with tools that enable them to analyze fee levels and to provide meaningful information to participants, we believe more can be done to improve that exchange as well.

Chairman Miller previously introduced H.R. 3185, a bill that addressed two key disclosure points:

- The disclosure of plan fees by a service provider to a plan administrator, and
- The disclosure of plan fees by a plan administrator to participants.

We very much appreciate the open and constructive approach that the Committee used in amending H.R. 3185 prior to its approval by the Committee last year. We especially appreciate the openness to our ideas on the part of Chairman Miller, Ranking Member McKeon, Subcommittee Chairman Andrews, and Subcommittee Ranking Member Kline. The revised bill included many significant improvements to the proposed legislation, including:

- Facilitating the use of electronic communication.
- Reducing the extent of unbundling and number of categories required.
- Permitting the use of estimated dollar amounts.
- The recognition that investment options with a guaranteed rate of return need separate treatment.
- A helpful delay in the effective date.
- Outside the context of investment options, eliminating the need to disclose all subcontractors and payments to subcontractors.
- Recognition of the liability issue with respect to service providers (reasonable reliance by service providers on information from unaffiliated service providers).

These important improvements to the bill are integral to making the disclosure of fees more effective. There are some specific proposals that we believe could be helpful in further improving the bill.

<u>Protecting the Voluntary System</u>

Before discussing the proposals in the bill that we believe would benefit from further discussion and improvement, we would like to discuss what has become a top concern for many plan sponsors: plan sponsor and fiduciary liability.

Over the past few years, we have seen significant growth in litigation involving defined contribution plans, much of which is directly related to plan fees. So, as this Subcommittee and the full Committee consider fee legislation, we urge you to also consider the nature of the fee-related litigation that has been filed and pay special attention to areas that could inadvertently increase litigation.

Plan sponsors cannot afford, either financially or from a participant-relations standpoint, to take legal compliance lightly. All litigation, even litigation when there has been no wrongdoing, is very costly. Plan sponsors are especially frustrated by so-called "strike suits" -- litigation filed only for the purpose of surviving a motion to dismiss, causing the sponsor to consider a large settlement in lieu of incurring the even greater litigation expenses that defending the action would require.

The effect of the fee and other defined contribution plan-related litigation on plan sponsors has been very significant.

- Litigation is a drain on resources, time, and money.
- It interferes with sound business planning.
- It undermines retirement security by reducing the sponsor's commitment to providing retirement programs.

Equally important, we want to correct the misimpression of those who view substantial increases in litigation as a positive means to vindicate employee rights and to transfer value to employees. Realistically, litigation results in remarkably little transfer of value to employees.

- The increased risk of litigation becomes factored into the cost of benefit plans through lower employer contributions and higher fees, resulting in reduced account balances.
- The sponsor's value is reduced, adversely affecting the accounts of participants in other plans whose accounts are directly or indirectly invested in the sponsor.
- Services become less comprehensive.

More litigation leads to increasingly reduced benefits for all participants.

Here are a few of our members' concerns in this regard, along with suggested solutions:

- **What happens if an <u>employer</u> discloses to participants fee information that has been provided by a <u>service provider</u> and that turns out to be incorrect?** To have a workable system, a plan sponsor that reasonably relies on service provider information should not have any liability.

- **What is a plan sponsor required to do with "unbundled" information?** The bill would require a bundled service provider to disclose separate fees for administrative and investment services. However, the bundled service provider does not offer such services separately. It is unclear how plan sponsors should use the information to compare services. They cannot compare it directly to actual unbundled fee structures, since the plan sponsors cannot purchase the services separately from the bundled service provider for the disclosed fee. The commercially reasonable action would be to compare the total cost of the bundled and unbundled services. Plan sponsors need clarification that this action will satisfy their fiduciary duties in this regard.

- The bill should make clear that, by obtaining and disclosing the information required by ERISA, plan fiduciaries will have satisfied their fiduciary duties in this regard.

- Minor, inadvertent errors, for example, in disclosing the fees associated with an investment option, should <u>not</u> provide participants with a cause of action.

<u>Disclosure by Plan Fiduciaries to Plan Participants</u>

I will now turn to fee disclosure issues in the bill. It is critical to emphasize that the disclosure rules should take into account the sharply different circumstances of participants and plan fiduciaries. Participants value clear, simple, short disclosures that effectively communicate the key points that they need to know to decide whether to participate and, if so, how to invest. Plan fiduciaries need more detailed information since it is their duty to understand fully the options available and to make prudent choices on behalf of all of plan participants.

Despite the many improvements to the current bill, the Council does believe that some additional changes could be made. These include:

- **The rules must be flexible enough to accommodate the full range of possible investment options, including brokerage windows.**

- **Disclosure of revenue sharing between two or more unrelated service providers should be required. Payments from one service provider to its <u>affiliated</u> service provider are not viewed as revenue sharing and should not be required to be disclosed.**

- **Fees paid by <u>plan sponsors</u> should not be subject to any of the disclosure rules. Where plan assets are not involved, ERISA's rules are not implicated.**

- **Fees charged to service providers by their own service providers have no relevance to plans and should not be required to be disclosed.**

- **Unbundling for disclosure purposes requires the production of data that is not commercially useable raising questions about its value.**

<u>Minimum Investment Option</u>

The decision to include a minimum investment option in the bill raises policies and questions that are distinct from those relating to fee disclosure. The minimum investment option in the bill is considerably different than the option described in H.R. 3185, and we have developed a number of questions regarding the new concept in the brief period that we have had to review the draft language.

We look forward to meeting with members of the Subcommittee to obtain a better understanding of what the option entails and to discuss our concerns.

Coordination of the Legislative and Regulatory Process

In the effort to improve the fee disclosure rules, we believe that it is very important that the legislative and regulatory processes be coordinated to avoid unnecessary costs and confusion resulting from having to change systems multiple times.

For example, it would be very harmful for the retirement system if one set of rules is created to be in effect for a year or two, only to be supplanted by a different set of rules. It is simply too confusing and too costly and not the best use of resources.

Accordingly, we urge both Congress and the Department of Labor to consider how best to coordinate their efforts to avoid any adverse consequences.

Effective Date

Any revisions to the fee disclosure rules will require:

- Interpretation and implementation by the Department of Labor,
- Extensive systems changes, and
- Development of effective communication methods.

Accordingly, it is critical that legislation not be effective prior to plan years beginning at least 12 months after the publication of final regulations interpreting the legislation and that the Department of Labor be given a reasonable period of time to develop them.

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We welcome this opportunity to share our views on the bill. We look forward to continuing our very constructive dialogue on plan fee disclosure -- the bill and any new amendments that will be considered -- with this Subcommittee and the full Committee.