



July 20, 2007

Filed Electronically
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
Attn: Fee Disclosure RFI

Dear Sir or Madam:

The American Benefits Council ("Council") appreciates the opportunity to comment in response to the Request for Information ("RFI") issued by the Department of Labor (the "Department") regarding fee and expense disclosures to participants in individual account plans, published at 72 Fed. Reg. 20,457 (April 25, 2007).

The Council is a public policy organization representing 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 strongly supports the disclosure of pertinent information about the fees and expenses that participants bear in 401(k) and other individual account plans covered by the Employee Retirement Income Security Act of 1974 ("ERISA"). As the RFI points out, approximately 41 million working Americans are covered by individual account plans that allow participants to make their own investment elections from among a menu of investment options offered by the plan. The overwhelming majority of these plans also allow participants to decide whether to participate and, if so, to select their contribution levels. It is important that participants in these plans have appropriate information about fees and expenses to assist them in making informed participation and investment decisions.

It is critical, however, that any fee disclosures actually be useful to typical plan participants. Put simply, more disclosure is not necessarily better disclosure. At best, too much information will simply result in disclosures that get ignored. At worst, too much information can exacerbate the paralysis that often affects plan participation decisions, thereby discouraging employees from voluntarily saving for retirement.

It is also essential that fee disclosures support rather than hinder workplace retirement plans which facilitate savings through payroll deduction. Investments that are made through employer-maintained plans have a number of very significant advantages relative to retail investments, particularly as it relates to fees. Plan fiduciaries take extensive steps to ensure that fee levels are fair and reasonable for their participants and ask hard questions regarding the various plan services and fees.

It is also vital that any fee disclosure requirements minimize the onus on employers. The retirement system has become overwhelmed by extensive disclosure requirements in recent years, and there is little question that the administrative burden of maintaining a retirement plan is approaching a critical level. It is not in the interest of participants or the U.S. retirement system as a whole for new disclosure requirements to discourage employers, particularly small employers with relatively little internal administrative capacity, from maintaining retirement plans.

Current Best Practices

Today, employers and plan service providers work hard to provide participants with meaningful, clear and concise information about fees and other key characteristics of plan investment options. In this regard, employers typically provide employees with all of the pertinent information about plan investment options and the costs of plan participation upon enrollment. This information includes prospectuses, fund fact sheets and comparative disclosures of the fees associated with each of the plan's investments as well as disclosure of any separate fees that may be deducted from participant accounts. These disclosures are usually accompanied by summary plan descriptions.

Employers also provide significant ongoing fee disclosure. This fee disclosure is sometimes part of a plan's periodic benefit statements or part of an annual notice. This disclosure often includes a list of the plan's investment options and the asset-based fees associated with each or a link to the same information.

In addition, employers (working with their plan service providers) make extensive use of click-through websites to offer information about plan fees and plan investments. Website disclosures are typically part of an integrated presentation of a participant's retirement savings and current investments. These disclosures allow for efficient, effective and participant-friendly delivery of key information.

The Council believes that many of these best practices foster simplicity, flexibility and efficiency in fee disclosure. They provide a foundation for any new disclosure requirements, and we urge the Department to develop an approach to disclosure that recognizes the needs of participants without overburdening plans and participants.

Scope of New Fee Disclosure Requirements

The Council agrees that there is room to improve the rules surrounding fee disclosure. The existing fee disclosure requirements are too limited. The only specific guidance targeted to plans that provide for participant investment direction are for plans that are intended to satisfy section 404(c) of ERISA. Moreover, even for section 404(c) plans, the existing disclosure requirements vary greatly depending on the nature of the plan's investment options. The disclosure requirements are clearly articulated for investments that are subject to the Securities Act of 1933 (mutual funds). However, many plan investment options are not mutual funds, and there is no guidance on the disclosure that pooled separate accounts, collective trusts and other similar investments should provide.

As a threshold matter, the Council believes that new fee disclosure requirements should apply without regard to whether a plan is intended to satisfy section 404(c) of ERISA. Section 404(c) provides a safe harbor from fiduciary responsibility for a participant's investment choices in certain circumstances. It does not speak to the information that participants should have in evaluating whether to participate in a plan and how to make investment choices (regardless of the plan fiduciary's responsibilities). The focus of the Department should be on improving disclosure practices in all participant-directed plans, as this will serve participants' interests more than a detailed reworking of the 404(c) regulations, which only apply to a portion of such plans.

Similarly, it is important that new disclosure requirements apply to all types of plan investment options. It makes little sense to impose disclosure requirements on investments in mutual funds but not other types of plan investments. It is also important that any disclosure requirements create a level playing field among investment options. It would be wholly inappropriate for any disclosure requirements to create a bias towards some investments rather than other investments. Thus, one of the key goals of disclosure should be comparability and providing the relevant information for all of a plan's investment options.

Methods of Disclosure

It is important that any new fee disclosure requirements encourage and facilitate the use of electronic technologies to provide plan investment and fee information. The Department's existing rules regarding the use of electronic technologies to deliver information to participants have been a major barrier to effective communication with participants. Not only would facilitating electronic means of communication open the door to more effective communication, it would also greatly reduce the costs of new disclosure requirements.

The Department's existing electronic communication standards have two major flaws. First, the existing standards typically require the affirmative consent of most

participants before electronic communication is permitted. Second, the existing standards generally prohibit employers from posting much of the information that is important to participants. Instead, the existing standards often require affirmative delivery of reams of information, which tends to overwhelm participants and obfuscate the information that is most important to them.

New rules should permit, and indeed encourage, employers to use e-mail delivery and internet or intranet posting as a means of delivering and providing access to fee and other information on plan investment options (while recognizing that certain participants without computer access will continue to need access to paper copies). Electronic notification to participants as to the posting or availability of required disclosures on websites will typically be the most inexpensive method of delivery and should be promoted under new disclosure rules. As is common practice today, plan sponsors will work with service providers to provide required information on plan investments and fees to participants and should be able to connect participants directly to content on the websites of service providers (via click-through web links or otherwise) rather than having to maintain all information on plan investment options and fees on their own internet or intranet site.

The key point is that, in order to be effective, any new disclosure requirements should be considered in the context of a rethinking of the Department's electronic delivery standards. We note that this reconsideration need not slow the development of fee disclosure guidance. In this regard, for example, the Department very recently took a new approach to electronic delivery and the role of posting in Field Assistance Bulletin 2006-03, which deals with periodic benefit statements required under the Pension Protection Act of 2006 ("PPA"). The periodic benefit statement guidance is much more flexible in terms of electronic delivery and generally permits posting of benefit statements. The Council is very encouraged by this development, and we believe that this method has been very successful in terms of communicating with participants.

Frequency of Disclosure

The Council believes that participants should receive disclosure about plan fees and expenses and the other key characteristics of plan investment options when they enroll in the plan and select plan investments for the first time. Some plans, particularly ones that have formulas for reduction of plan fees as assets grow, will not know in advance the exact asset-based or per-account fee levels that participants will face in the year ahead. As a result, plan sponsors should be permitted to use fee levels from the most recently concluded plan year in the fee disclosures they make to participants at enrollment or, if the employer so chooses, fee levels from a more recent date, *e.g.*, last day of the month preceding enrollment. In any event, reasonable estimates should be permitted.

To supplement the information provided upon enrollment, plan sponsors should communicate to participants on an annual basis about where they can find information on fees and other characteristics of plan investment options (by providing a click-through web link or by directing them to an internet or intranet website, telephone number or plan official). Plan sponsors should retain flexibility as to whether this would be a stand-alone communication or a component of an existing disclosure document. For example, employers should be able to fold this communication into one of their periodic benefit statements. Plan sponsors should be required to update the underlying information on fees and other characteristics of plan investment options annually.

Disclosure of Fees Affecting Investment Choices

In terms of the particular information that should be disclosed, there are three broad categories of fees from the perspective of participants. First, there are asset-based fees that are deducted from participant's investments. Second, there may be separate ongoing fees. For example, a plan may pay a fixed fee for recordkeeping services. These fees may be allocated by the plan's fiduciary and deducted from participant accounts. Third, there are transactional fees, such as fees charged for loans. We recommend disclosure based on these categories.

We recognize that there are other ways of categorizing fees. For example, some have suggested classifying fees based on whether the fees pay for investment management, administration, intermediary compensation or plan transactions. The Council believes, however, that these classifications are not germane to participants and would be very costly to identify. The relevant information for participants is the overall fee structure of a plan, the cost of each investment and the cost of plan transactions.

Asset-Based Fees. For every investment option offered by the plan, participants should be informed of the asset-based fees associated with the investment. These fees should be disclosed in the manner in which they are charged, *i.e.*, as a percentage of each investment. To allow participants to choose among the plan's investment options, it is essential that this disclosure simply be one "all-in" number, thereby allowing for ease of comparison.

In some plans, asset-based charges on investments not only finance investment management but also cover other plan services, including intermediary compensation and plan administrative services. These asset-based charges may vary by investment. We see little benefit to participants of breaking the relative charge for any investment option into fees paid for investment management and fees paid for administrative costs or intermediary compensation. This information is simply not relevant to the investment decision and will only confuse and complicate investment decisions. Accordingly, we strongly support disclosure of a single data element for each investment option.

Where asset-based charges cover other services rather than attempt to separately capture the portion attributable to each service, the Council believes that participants should receive a general disclosure that the asset-based fees they pay defray other plan costs. This disclosure should only be required where asset-based fees are explicitly used to pay for services other than investment management, *e.g.*, 12b-1 fees in a mutual fund. A more granular approach would not yield meaningful information for participants.

A subset of asset-based fees associated with investments are fees that are assessed on a transactional basis, including, for example, redemption fees, market value adjustments, front end and back end loads and surrender charges. Whether and when these fees are charged depends on the participant's investment decisions. The Council recommends that these fees be disclosed to participants upon enrollment and that a subsequent notice be provided once such a charge has been imposed. The initial disclosure could be done in connection with disclosure of the ongoing asset-based fees associated with an investment option. The subsequent notice could be provided on the annual notice we recommend or on a separate notice, such as a confirmation of transaction notice, provided no later than 12 months after the transaction.

One issue related to asset-based fees is distinguishing between fees and investment returns. Some investments are effectively contract promises of a financial institution, for example, guaranteed investment contracts ("GICs"). In this context, we believe that there is little benefit in requiring the identification and independent disclosure of fees. Rather, we recommend disclosure solely of such an investment option's guaranteed rate of return and a statement indicating that the fees associated with the investment option are assessed in determining the fund's guaranteed rate of return. This will make clear that an investment has fees but will not require the independent identification of fees that cannot impact the fund's return on investments.

Another unique category of investments arises from open brokerage windows. As you know, some plans permit participants to direct the investment of their account balances among, for example, all mutual funds that are available in the marketplace through a brokerage account. In these plans, the brokerage account is considered the investment option and it is simply not possible for the plan to provide fee information about every mutual fund that is available in the marketplace. Instead, it should be permissible for the plan to provide a notice alerting participants to any specific costs of using a brokerage account option and informing them that they are responsible for determining the costs associated with all investments purchased through the brokerage account. The notice would also provide contact information for the brokerage account provider.

Transactional Fees. The Council believes that, at the time a participant first becomes enrolled in the plan, a notice should be provided disclosing that some transactions or services that are not investment related (*e.g.*, plan loans, use of investment advice or managed account services) will result in additional charges to participant accounts, the

specifics of which will be disclosed in conjunction with the particular transaction or use of the particular service. The initial disclosure of transaction fees (unlike the disclosure, discussed above, for transaction fees that are investment related, *e.g.*, loads) need not contain a comprehensive list because many of these fees will only be incurred by some participants and in limited circumstances. Disclosure of all possible transactional charges, many of which will never be applicable to most participants, would make fee disclosure cumbersome and would obscure the core information, but detailed information about costs for participant-initiated transactions should be made available upon participant request.

Participants should also receive disclosure regarding any specific transaction dollar charges that have been deducted from participant accounts. Such charges would include dollar charges that result from participant-initiated transactions (such as plan loans). Plan sponsors should have flexibility as to the means and timing of such disclosure. For example, some sponsors may include this information in quarterly benefit statements while others may include it in a confirmation notice following a particular transaction.

Ongoing Separate Fees. Plans should also disclose any plan administration or ongoing service charges that will be deducted from participant accounts but that are not covered by asset-based fees or transactional fees. These fees would include any administrative charges to be deducted from participant accounts. This information is largely important because it helps participants to assess the total cost of investing in the plan, rather than the cost of investing in any particular investment option. In this regard, we also believe that the plan fiduciary should disclose its method of allocating any plan administration or ongoing service charge among participant accounts, *e.g.*, per capita to all accounts.

We believe, however, that disclosure should only be required for ongoing separate fees where such fees are in fact deducted from participants' accounts. Disclosure should not be required to the extent that the employer is paying such expenses. This is proprietary information and, although employers should be free to disclose such information, it should not be required. Similarly, we believe that disclosure should not be required to the extent that such fees are paid from unallocated plan assets, such as assets held in a plan's forfeiture account.

The Council believes that this approach of providing disclosure of (i) the costs of each investment option, (ii) the transactional charges and (iii) the costs of the plan, provides the key information that participants need. We do not see any benefit associated with providing plan participants with voluminous and granular information about plan fees of the sort that is typically appropriate for plan sponsors. This information would not assist participants with their selection among plan investment options. Even more importantly, providing such information to plan participants could impair sound decision-making by overloading them with information and appearing to elevate fees

above all other investment selection criteria (which can produce poor investment decisions).

Comparative Disclosure

The Council strongly believes that it is important for plan sponsors to retain the flexibility to determine the specific format for communicating fee and other plan investment information to their particular participant population. Some plans will choose to develop a single matrix that includes the relevant information for each investment option with links to websites with more detailed information. Other plans will utilize plan investment profiles that are modeled along the profile disclosures commonly used for investments subject to the requirements of the Securities Act of 1933 (typically, two-page summaries). Still other plans may choose more robust formats for disclosing plan information, which may make sense where a plan has a limited menu of investment options. There is no right answer as to the appropriate format and we urge the Department to retain sponsor flexibility to tailor the communications to the particular participant population and plan.

Regardless of the format used, we recognize that it is important for employers to disclose fee information in as uniform and comparable a form as possible to facilitate comparison across the investment options made available under the plan. Disclosure approaches designed to facilitate comparison, however, must permit communication of any unique features specific to a particular investment option and therefore not comparable across all plan investments. Once again, web-based disclosure methods and tools are likely to be the most useful as they can visually convey the full range of plan investment options while allowing participants to access more detailed information about each option via click-through web links.

Other Key Information Affecting Investment Decisions

Fees should be disclosed along with other information participants need in order to make informed investment decisions. Fee information should not be elevated in such a way as to suggest that fees are the most important factor in selecting investments from among the plan's options. Indeed, an undue focus on fees in new required disclosures could lead participants to select the lowest-cost investment option in a plan, which will often not be the appropriate choice for a participant investing for retirement.

For these reasons, the Council believes that, at the time of enrollment, participants should be provided information on the fees associated with a plan investment option accompanied by information on other key characteristics of the option: the option's investment objective and product characteristics, its historical performance and level of risk, as well as the identity of the investment advisor or product provider. This information about each investment option should be conveyed in clear and simple terms, and plan sponsors should retain flexibility to determine the specific format in

which such information is communicated to participants. Web-based disclosure of this information about investment options will often be the most useful for participants. It permits them to browse multiple interrelated pieces of information and to access more detailed information about a given investment option or topic that may be of interest to some participants but not all.

Investment Education

Under current law, employers do not have a fiduciary obligation to provide participants with investment education. The Council believes that this is the right reading of ERISA and we believe that this should continue to be the law.

For this reason, we believe that the Department should continue to develop and publicize education materials that provide context for fee and other plan investment information. Participants make the best use of information about their plan investment options (including information regarding fees) when this information builds on basic investment education. The PPA (already defined) contains a requirement that ensures participants have access to investment education materials. Under the PPA, the quarterly benefit statements provided to participants who direct their retirement plan investments must include a notice directing these individuals to a Department website on individual investing and diversification (<http://www.dol.gov/ebsa/investing.html>). Among the materials posted on this website is the DOL's brochure, *A Look at 401(k) Plan Fees*. Plan sponsors may wish to direct participants to this important resource at other times and through other means as well, including at enrollment when they provide participants with initial information on plan investment options and fees. Other plan sponsors will likely want to continue to draw on the extensive and often innovative investment education materials that they and their service providers have developed and continue to develop. Given the extensive work by the private sector in the investment education area and the new prominence of the DOL's individual investing website as a result of the PPA requirement, we recommend that the DOL establish a formal and periodic process to seek private-sector input regarding the contents of the site.

Sensitivity to Plan Costs

While participant disclosure should contain sufficient information on fees and other key investment option characteristics for participants to make sound investment decisions, we urge the Department to bear in mind that additional disclosure requirements come with added costs. Such costs must be justified in terms of providing a material benefit to participants as they select among plan investment options, and the costs of some potential disclosure requirements would simply be exorbitant and unjustified. Clearly, any new disclosure requirements will impose new expenses and burdens on both plan sponsors and plan service providers. These costs are likely to be reflected in higher prices for plan administrative services, which are appropriately payable from plan

assets. The result in many defined contribution plans is that the added costs of new disclosure requirements will be borne directly by plan participants. Plan sponsors and providers will also be concerned that expanded disclosure requirements could result in new and costly liabilities, a result that must be avoided in order not to further increase expenses in the system. For some small employers, new disclosure costs and related potential liabilities could even contribute to a reluctance to sponsor a qualified retirement plan for employees. Given the associated costs, the Council believes that it is imperative that new disclosures to participants be focused squarely on providing participants with fee and other information that will actually be useful in making investment decisions. Providing voluminous and granular fee information to participants will not aid in their decision-making process and will increase participant, sponsor and provider costs without justification.

* * *

We very much appreciate the opportunity to provide our views on these important issues and look forward to continued discussions as the regulatory process moves forward.

Sincerely,

A handwritten signature in black ink, appearing to read "Jan Jacobson". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Jan M. Jacobson
Retirement Policy Legal Counsel