The ERISA Industry Committee

July 19, 2007

Attention: Fee Disclosure RFI
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

Ladies and Gentlemen:

The ERISA Industry Committee ("ERIC") is pleased to submit this response to the Employee Benefit Security Administration's (EBSA's) Request for Information (April 24, 2007) regarding disclosure of fees and other information in participant-directed retirement plans.

ERIC is a nonprofit association committed to the advancement of the employee retirement, health, incentive, and welfare benefit plans of America's largest employers. ERIC's members provide comprehensive retirement, health care coverage, incentive, and other economic security benefits directly to some 25 million active and retired workers and their families. ERIC has a strong interest in proposals affecting its members' ability to deliver those benefits, their costs and effectiveness, and the role of those benefits in the American economy.

As sponsors of the nation's largest participant-directed retirement plans, ERIC's members are in a unique position to provide input to the Department of Labor's (DOL's) regarding its effort to improve participant fee disclosure. It is critical that any regulatory action taken by the DOL recognize the following core principles:

- **Disclosure should be designed primarily to inform participants of their investment choices.** The primary purpose of new regulations should be to enhance the ability of participants in participant-directed defined contribution plans to make reasonable and appropriate investment decisions. To help achieve this goal, any new DOL disclosure regulations should place plan investment option fee information in context of its materiality to the participants' plan investment elections as compared to other information important to that decision. Caution should be exercised so as not to require the universal provision of information that is not material to that goal. An information overload can easily result in participant confusion, misunderstanding, or mistakenly giving fees undue weight in making their investment sections.

1400 L Street, N.W.
Suite 350
Washington, DC 20005
TEL: (202) 789-1400
FAX: (202) 789-1120
www.eric.org

- **Any new disclosure requirements must be cost-efficient.** In most large plans, the majority of plan costs are borne by participants. While disclosure is important, it is also important that the DOL carefully weigh the benefit of new disclosure requirements against their economic and practical cost to participants.

- **Any new disclosure requirements should be clear.** Any new requirements must provide clear guidance that allows plan sponsors to know with precision what is required of them. Any ambiguity in the new requirements may result in the new requirements being misused in additional legal challenges that, over time, can only threaten the viability of the defined contribution system.

- **Plan sponsors will often require the cooperation of service providers to provide disclosure.** The ability of plan sponsors to provide information to participants is often dependent upon the sponsor's ability to obtain the information from a third-party service provider. Some information may reasonably be considered trade secrets and the third-party service providers may be unwilling to disclose such information. The Department should be careful not to create any potential liability for plan sponsors who have been unable to obtain such information despite a good-faith effort.

- **Any new disclosure requirements must be clearly prospective only.** Many large defined contribution plan sponsors have come under attack in the courts for failing to disclose information that the vast majority of plan sponsors do not in good faith consider required under current law. It is critical that any new disclosure requirements be clearly <u>new</u> requirements and clearly not 'clarifications" of preexisting ones. If they are not clearly <u>new</u> disclosure requirements, the recent rash of lawsuits demonstrates the threat it would create to the viability of the defined contribution system. DOL should be mindful of any new requirements' potential misuse in litigation or otherwise to improperly define what requirements are under current law.

ERIC believes that any new disclosure requirements should adhere to the above principles. In pursuing this regulatory project, the DOL should consider several other factors discussed below.

I. Breadth of Disclosure Requirements

EBSA's request for information appears to contemplate new disclosure requirements being included as part of an update of the 404(c) regulations. While ERIC applauds any effort to modernize 404(c) to better reflect current practice, ERIC believes that any new disclosure requirements should not be included as part of an update to that section. Instead, ERIC urges EBSA to consider disclosure requirements as a distinct regulatory project.

Under ERISA Section 505, the DOL has authority to require that all participants who have the right to direct investment of their accounts have basic information about plan investment options. ERISA Section 505 provides DOL with the necessary authority to issue regulations that are necessary or appropriate under Title I of ERISA, which includes the statute's fiduciary responsibility requirements. In addition, ERISA Section 109 grants DOL authority to prescribe the content of reports and documents, including materials furnished or made available to participants.

ERIC strongly believes that the justifications underlying disclosure requirements for plans seeking to meet the 404(c) safe harbor apply equally to all participant-directed defined contribution plans. As such, ERIC urges the DOL to pursue any new disclosure requirements under Sections 505 and 109 of ERISA rather than as part of a reworking of 404(c).

The DOL should be mindful of creating potential conflicts between the current 404(c) disclosure requirements and any new potential disclosure requirements. This is critical to ensure that participants are not overwhelmed with multiple disclosures reducing their value and usefulness.

II. The Purposes of Disclosure

Disclosure to participants serves different needs than disclosure to plan sponsors. The purposes behind fee disclosure to plan administrators and plan participants are fundamentally different. That fundamental difference results in different needs that must be reflected in the scope of any new regulation.

In selecting and monitoring a plan's service providers and menu of investment options, plan administrators are engaging in fiduciary acts that are subject to a number of ERISA-imposed obligations (to act prudently and in the best interest of participants, to pay no more than reasonable compensation, to avoid prohibited conflicts of interest, etc.). Such determinations depend upon having information relevant to that purpose, including information about the services provided, fees charged and compensation earned by plan service providers (including through revenue sharing arrangements between providers).

Participants, on the other hand, are not selecting among service providers and are not determining the menu of plan investment options. Instead, they are making a choice among the menu of plan investment options selected by their plan administrator. The total fees charged for the various plan investment option are one, but only one, of a number of important criteria material to the participants' investment choices (and not the most important one). While certain information may be material to the plan administrator in executing its role, overly voluminous and granular information about plan investment option fees and service provider compensation (including revenue sharing), simply does not assist participants in selecting among plan investment options. In short, participants generally need to know the gross fees associated with each investment options and other plan level or individually assessed fees.

Even more importantly, requiring the universal disclosure of such information to all plan participants could impair sound decision-making by overloading them with information – resulting in poorer investment choices because of undue weight given to plan investment option fee information over other facts and circumstances equally or more relevant to the participants' investment election decisions. Unnecessary complexity from information overload can even deter plan participation. ERIC strongly urges that the scope of any new participant disclosure obligations be tailored to the differing needs of plan participants and plan administrators and recognizing that requiring universal disclosure to plan participants of information not likely to be material to them can create a significant risk of detrimental effects.

III. A Tiered Disclosure Structure

ERIC strongly believes that primary participant disclosures under any new rule should be focused on the purpose of improving participant's plan investment elections. To accomplish that goal, disclosure should be tiered with some information provided to participants upon enrollment with more detailed information available upon request. This will ensure that potentially confusing and misleading information that is not likely to be material to participants who want to receive it.

A. The Primary Disclosure

Disclosure to participants should include expenses likely to materially affect participants' plan investment option choices. For every investment option offered by the plan, participants should be informed of fees paid from fund assets (investment management fees, 12b-1 fees, and other investment service fees) ("asset-based fees") and any flat-rate per-participant charges associated with the investment. In some plans, asset-based charges on investments not only finance investment management but are also used to defray plan administrative costs ("administrative charges"). In plans where asset-based charges are used for this purpose, participants should be informed of the existence of such arrangements. Plans should also disclose any plan administration or ongoing service charges that will be deducted from participant accounts but that do not vary based on the specific investments selected by the participant.

By disclosing asset-based fees, sales charges, and any administrative charges to be deducted from participant accounts, participants will be able to better understand the total cost of investing in his or her plan's various investment options. Disclosure should also include information concerning participant charges for specific transactions or services (*e.g.*, plan loans, use of investment advice or managed account services, trades that trigger redemption fees, use of brokerage windows), but the specifics of such charges may only be disclosed in conjunction with the particular transaction or use of the particular service.

Disclosure of all possible transactional charges, many of which will never be applicable to most participants, would make the primary disclosure more cumbersome and would obscure the core information. Detailed information about costs for participant-initiated transactions should be made available upon participant request and at the time of the transaction. In addition, such disclosures could be set forth in the summary plan description ("SPD") (recognizing that the charges could change sooner than the SPD is updated). Plan sponsors should have discretion as to the precise form these various fee disclosures will take based on the facts and circumstances, but they will typically be expressed as a rate (in basis points) and/or as an illustrative (or actual) dollar charge.

The initial disclosure should provide fee information in context with other information to encourage appropriate investment decisions. Fee information should not be elevated in such a way as to suggest that fees are the only important factor in selecting investments from among the plan's options. Indeed, an undue focus on fees in any new disclosure requirements could lead participants to select the lowest-cost investment option in a plan, without regard to whether it is a participant's best choice. Moreover, fee disclosure often times only makes sense in the context of fund performance.

Information on the fees associated with a plan investment option should be 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. Internet-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 the more detailed information about a given investment option or topic that may be of interest to some participants but not all.

The initial disclosure of fees and other plan investment information should facilitate easy comparison. While plan sponsors should retain flexibility to determine the specific format for communicating fee and other plan investment information to their particular participant population, any new disclosure requirements should encourage the use of as uniform and comparable a format to facilitate comparisons 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, Internet-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.

The initial disclosure should be made upon enrollment in the plan and made available at least annually thereafter. The information should be updated if the plan administrator is notified that the basis of an expense has materially changed.

B. Secondary Disclosures

Some participants may desire additional information about their defined contribution plan. This additional fee information should be made available to participants only upon request. This helps ensure that participants, in general, are provided the information needed to inform their selection of investment vehicles without additional, often potentially confusing, information.

While most large plans bear the cost of their own administration, some plan sponsors directly pay a portion of the administrative costs. ERIC believes that there should be no obligation to disclose expenses paid directly by the plan sponsor. While the plan administrator needs to take direct plan sponsor payments into account to determine whether any payment actually made with plan assets is unreasonable, it has little relevance to a typical participant in making his or her investment elections. In addition, calculating such costs could be burdensome and complicated. For example, audit expenses may not be broken out separately for the plan compared to other activities, or an employee may split their time between plan administrative and other tasks. In such cases, requiring disclosure would provide little value to participants while increasing administrative costs. Plan sponsors, however, should have flexibility to disclose sponsor paid fees as they determine to be appropriate.

Likewise, a mandate to disclose revenue sharing payments is not warranted given its minimal relevance to a typical participant's plan investment elections and the very real risk that such universal disclosure may result in a significant numbers of participants believing that revenue sharing payments

are an additional expense on top of the expense ratio. Because this information is potentially confusing, ERIC believes that while a disclosure in the SPD or initial disclosure that such arrangements exist between the service provider and third parties or the plan sponsor is appropriate, including detailed information about the arrangements would only serve to confuse and overwhelm participants. Participants who desire additional information about revenue sharing arrangements between third parties can be provided upon request via a secondary disclosure.

Beginning with the 2008 plan year, revenue sharing payments will be required to be disclosed in the Form 5500. Such requirement will help ensure that the service providers disclose such revenue sharing to the plan administrator. Plan sponsors may provide further revenue sharing disclosure to participants when requested by providing a copy of the Form 5500.

IV. The Costs of Disclosure

While participant disclosure should contain sufficient information for participants to make sound investment decisions, ERIC urges the DOL to keep in mind that additional disclosure requirements come with added costs. 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. New disclosure 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.

Given the associated costs, ERIC believes that it is imperative that new disclosures to participants be focused squarely on providing participants with fee and other information that are likely to be of actual material use to them in making their investment decisions from among those options offered by their plan. Providing voluminous and overly detailed fee information to participants is not likely to materially aid in—and may actually impair—that decision-making process. Rather, it is more likely simply to increase costs for little or no benefit.

One important way to reduce the costs of new disclosure requirements is to take full advantage of electronic mechanisms for providing information. ERIC urges that any new rules should permit, and indeed encourage, employers to use 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). We encourage the DOL to adopt a "notice and access" approach similar to the model recently adopted by the Securities and Exchange Commission as an optional method for delivery of proxy materials to shareholders.

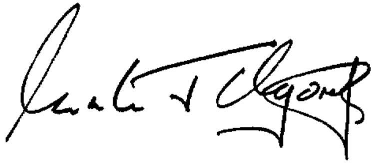
Notification to participants as to the posting or availability of required disclosures on websites will typically be the most inexpensive method of delivery and should be promoted under new disclosure rules. As is common practice today, plan sponsors will work with service providers to provide required information on plan investment options to participants and should be able to connect participants directly to content on the websites of service providers (via click-through Internet links or otherwise) rather than having to maintain all information on plan investment options and fees on their own extranet or intranet site.

V. Conclusion

ERIC applauds the DOL and EBSA's efforts to improve the quality and effectiveness of participant disclosures in defined contribution plans. We recognize the importance of adequate disclosure to participants and recognize that many employers may already be disclosing much of the information that participant's need. In any disclosure project, the DOL and EBSA should focus on improving the form and usability of participant disclosures while ensuring that plan sponsors are given adequate flexibility to design disclosures that meet their needs. Any new requirements must be clearly stated to ensure plan sponsors are not put into legal jeopardy threatening the continued viability of the defined contribution system.

ERIC appreciates the opportunity to provide information on this important topic and will continue to examine these issues and supplement our comments if it becomes necessary. If the DOL or EBSA has any questions about our comments, or if we can otherwise be of assistance, please let us know.

Sincerely,



Mark Ugoretz
President
THE ERISA INDUSTRY COMMITTEE

CC: Robert Doyle
Director, Office of Regulations and Interpretations
Employee Benefits Security Administration

Katherine D. Lewis
Office of Regulations and Interpretations
Employee Benefits Security Administration