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DEPARTMENT OF LABOR

Employee Benefits Security Administration

29 CFR Part 2550

RIN 1210-AB07

Fee and Expense Disclosures to Participants in Individual Account Plans

AGENCY: Employee Benefits Security Administration, Department of Labor.

ACTION: Request for information.

SUMMARY: The Department of Labor is currently reviewing the rules under the Employee Retirement Income Security Act (ERISA) applicable to the disclosure of plan administrative and investment-related fee and expense information to participants and beneficiaries in participant-directed individual account plans (e.g., 401(k) plans). The purpose of this review is to determine to what extent rules should be adopted or modified, or other actions should be taken, to ensure that participants and beneficiaries have the information they need to make informed decisions about the management of their individual accounts and the investment of their retirement savings. The purpose of this notice is to solicit views, suggestions and comments from plan participants, plan sponsors, plan service providers and members of the financial community, as well as the general public, on this important issue.

DATES: Written or electronic responses should be submitted to the Department of Labor on or before July 24, 2007.

ADDRESSES: Responses: To facilitate the receipt and processing of responses, EBSA encourages interested persons to submit their responses electronically by e-mail to e-ORI@dol.gov, or by using the Federal eRulemaking portal at <http://www.regulations.gov> (follow instructions for submission of comments). Persons submitting responses electronically are encouraged not to submit paper copies. Persons interested in submitting written responses on paper should send or deliver their responses (preferably, at least three copies) to the 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, Attention: Fee Disclosure RFI. All written responses will be available to the public, without charge, online at <http://www.regulations.gov> and <http://www.dol.gov/ebsa>, and at the Public Disclosure Room, N-1513, Employee Benefits Security Administration, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210.

FOR FURTHER INFORMATION CONTACT: Katherine D. Lewis, Office of

Regulations and Interpretations, Employee Benefits Security

Administration, Room N-5669, U.S. Department of Labor, Washington, DC

20210, telephone (202) 693-8510. This is not a toll-free number.

SUPPLEMENTARY INFORMATION:

A. Background

According to the Department's most recent data, an estimated 41 million participants in 401(k) plans are permitted to direct the investment of all or a portion of their plan accounts. While contributions and earnings increase retirement savings in 401(k) and other participant-directed plans, fees and expenses charged to participant accounts can substantially reduce that growth. For this reason, it is important that plan participants, particularly those responsible for making their own investment decisions, consider what and how fees and expenses are charged to their individual accounts.

In general, the purpose of this Request for Information (RFI) is to obtain, from the perspective of plan participants, plan sponsors and plan service providers, information concerning: (1) What administrative and investment-related fee and expense information participants should consider; (2) the manner in which that information should be provided or made available to participants; and, (3) who should be responsible for providing the information. Responses to this RFI will be used to assist the Department in determining to what extent rules should be developed or modified, or other courses of action pursued, to improve the information currently available to participants and beneficiaries relating to administrative and investment-related fees and expenses, recognizing that in many instances participants may have to bear the cost of disclosing such information.

In considering the questions set forth in the RFI, commenters are encouraged to take into consideration the following initiatives.

Section 404(c) regulation

In 1992, the Department adopted a final regulation under section 404(c) of ERISA.¹ In general, the regulation sets forth the conditions under which participants are considered to be exercising control over the assets in their accounts, thereby relieving fiduciaries from liability for the results of participants' investment decisions. Among other matters, the regulation, at §2550.404c-1(b)(2)(i)(B), conditions relief upon participants and beneficiaries being provided and having access to specific information concerning their plan and the investment options offered thereunder. In framing the disclosure requirements, the Department attempted to strike a balance between what it believed participants needed to make informed investment decisions and the burdens and costs to participants and plan sponsors resulting from a broader disclosure mandate. There have been a number of changes since 1992 in what and how information is communicated to plan participants and investors generally. For this reason, this RFI seeks information on what changes, if any, should be made to the section 404(c) regulation. An example of one such change is the use of summary or profile prospectuses by mutual funds as a means by which to communicate basic information to investors. The use of profile

prospectuses as a permissible means by which to communicate to participant-investors for purposes of compliance with the section 404(c) requirements was addressed in Advisory Opinion 2003-11A.2

To facilitate consideration of the section 404(c) disclosure requirements, the applicable provisions of section 2550.404c-1(b)(2)(i) are set forth below in relevant part:

(B) The participant or beneficiary is provided or has the opportunity to obtain sufficient information to make informed decisions with regard to investment alternatives available under the plan, and incidents of ownership appurtenant to such investments. For purposes of this subparagraph, a participant or beneficiary will not be considered to have sufficient investment information unless -

(1) The participant or beneficiary is provided by an identified plan fiduciary (or a person or persons designated by the plan fiduciary to act on his behalf):

* * *

(ii) A description of the investment alternatives available under the plan and, with respect to each designated investment alternative, a general description of the investment objectives and risk and return characteristics of each such alternative, including information relating to the type and diversification of assets comprising the portfolio of the designed investment alternative;

* * *

(v) A description of any transaction fees and expenses which affect the participant's or beneficiary's account balance in connection with purchases or sales of interests in investment alternatives (e.g., commissions, sales load, deferred sales charges, redemption or exchange fees);

(vi) The name, address, and phone number of the plan fiduciary (and, if applicable, the person or persons designated by the plan fiduciary to act on his behalf) responsible for providing the information described in paragraph (b)(2)(i)(B)(2) upon request of a participant or beneficiary and a description of the information described in paragraph (b)(2)(i)(B)(2) which may be obtained on request;

* * *

(viii) In the case of an investment alternative which is subject to the Securities Act of 1933, and in which the participant or beneficiary has no assets invested, immediately following the participant's or beneficiary's initial investment, a copy of the most recent prospectus provided to the plan. This condition will be deemed satisfied if the participant or beneficiary has been provided with a copy of such most recent prospectus immediately prior to the participant's or beneficiary's initial investment in such alternative;

(ix) Subsequent to an investment in a investment alternative, any materials provided to the plan relating to the exercise of voting, tender or similar rights which are incidental to the holding in the account of the participant or beneficiary of an ownership interest in such alternative to the extent that such rights are passed through to

participants and beneficiaries under the terms of the plan, as well as a description of or reference to plan provisions relating to the exercise of voting, tender or similar rights.

(2) The participant or beneficiary is provided by the identified plan fiduciary (or a person or persons designated by the plan fiduciary to act on his behalf), either directly or upon request, the following information, which shall be based on the latest information available to the plan:

(i) A description of the annual operating expenses of each designated investment alternative (e.g., investment management fees, administrative fees, transaction costs) which reduce the rate of return to participants and beneficiaries, and the aggregate amount of such expenses expressed as a percentage of average net assets of the designated investment alternative;

(ii) Copies of any prospectuses, financial statements and reports, and of any other materials relating to the investment alternatives available under the plan, to the extent such information is provided to the plan;

(iii) A list of the assets comprising the portfolio of each designated investment alternative which constitute plan assets within the meaning of 29 CFR 2510.3-101, the value of each such asset (or the proportion of the investment alternative which it comprises), and, with respect to each such asset which is a fixed rate investment contract issued by a bank, savings and loan association or insurance company, the name of the issuer of the contract, the term of the contract and the rate of return on the contract;

(iv) Information concerning the value of shares or units in designated investment alternatives available to participants and beneficiaries under the plan, as well as the past and current investment performance of such alternatives, determined, net of expenses, on a reasonable and consistent basis; and

(v) Information concerning the value of shares or units in designated investment alternatives held in the account of the participant or beneficiary.

Advisory Council Report

In 2004, the Advisory Council on Employee Welfare and Pension Benefit Plans' Working Group on Fee and Related Disclosures to Participants reviewed the current disclosure requirements applicable to participant-directed individual account plans. Their review sought to assess the adequacy and usefulness of such requirements and to determine whether changes to the requirements would help participants more effectively manage their retirement savings. Focusing on the requirements applicable to section 404(c) plans, the working group issued a report containing a consensus recommendation, which is summarized below:

The working group recognizes that providing actual fee information for a particular participant's account over a stated period of time is not justified at this time by the cost of providing that information. Given the current state of technology and recordkeeping practices, it is a complex and costly procedure to sum the total costs to a particular participant's account because of investment

changes over time. Nonetheless, the working group saw examples of investment statements showing the expense of each investment option expressed as a ratio for each fund in which a participant was invested as of the date of the statement. The working group believes that this is pertinent information that is helpful in making the investment decision. This information can also be presented in an understandable format.

With regard to the section 404(c) regulation, the consensus of the working group, recognizing that different considerations apply to open platform (also known as open brokerage) options in plans, made the following recommendations:

The profile prospectus of each investment option should be delivered to each employee upon eligibility to participate. For those options not subject to the prospectus requirements, the working group recommended that the Department should require a disclosure with information substantially similar to the information on the profile prospectus. Providing this information prior to the initial investment decision should eliminate the need to automatically provide a full prospectus or other information concerning the particular investment options elected immediately after the investment options are elected. A participant would still be able to request such materials.

Participants must be given materials (like a glossary) that explain the meaning of the terms used in the profile prospectus (or other like document) coincident with the delivery of the profile prospectus. This explanation would include a description of an expense ratio and what it means to have the investment expenses of an investment option expressed as a ratio. Included in this would be a mathematical example demonstrating the calculation necessary to approximately determine the expenses that apply to a particular participant's account investments as of a particular date.

Account and investment recordkeepers should be encouraged to develop internet web sites where participants can research information about plan investment options and review information about their own investment choices. Additionally, these recordkeepers should be encouraged to develop web-based tools for participants to calculate alternative investment scenarios that incorporate assumptions about investment expenses as well as rates of return. Nonetheless, it is not intended that the suggestions in this paragraph be made into requirements.

To the extent that an annual statement is provided by the recordkeeper, the statement must provide the expenses of each investment option expressed as a ratio along with other information provided about the investment options. There must also be an identification of the investment expenses that are paid entirely or in part by the plan sponsor. The investment expenses do not include other expenses for general plan maintenance paid by the plan sponsor, including, but not limited to, legal expenses, consulting expenses and accounting expenses. If such investment expenses were paid in part by the plan sponsor, the portion so paid would be identified.

Any new requirement implemented under this item 3 [annual statement recommendation] should have a delayed effective date as applied to small and medium sized plans, based on the number of participants. New requirements like those described in this item [annual statement

recommendation] could be more costly to implement for such plans than for large plans. Defining what a small to medium size plan is for these purposes should err on the high side. Perhaps plans covering fewer than 500 participants would come within this classification. Delaying the application would likely allow service providers time to design necessary systems to provide the contemplated disclosures in a cost effective manner for such sponsors.

The Department should provide a sample model disclosure format that is available on its web site. This would be a helpful addition to existing tools already provided on its web site for understanding expenses both from the perspective of a participant and a plan sponsor.

Commenters are encouraged to consider the report and recommendations of the working group in reviewing the issues identified in this RFI. This report may be accessed at www.dol.gov/ebsa/publications/AC_111704_report.html.

GAO Report

In November 2006, the Government Accountability Office (GAO) published Report GAO-07-21 entitled "Private Pensions: Changes Needed to Provide 401(k) Plan Participants and the Department of Labor Better Information on Fees." This report recommends that, in order to better enable the Department to effectively oversee 401(k) plan fees, the Secretary of Labor should require plan sponsors to report a summary of all fees that are paid out of plan assets or by participants. The summary should list fees by type, particularly investment fees indirectly incurred by participants.

Commenters are encouraged to consider the report and recommendations of the GAO in reviewing the issues identified in this RFI, including the GAO's specific recommendation relating to fee disclosure. The GAO report referenced above may be accessed at www.gao.gov/htext/d0721.html.

B. Issues Under Consideration

The purpose of this notice is to solicit views, suggestions and comments from plan participants, plan sponsors, plan service providers and members of the financial community, as well as the general public, as to what extent rules should be adopted or modified, or other action taken, to ensure that participants and beneficiaries have the information they need to make informed decisions about the management of their individual accounts and the investment of their retirement savings. To facilitate consideration of the issues, the Department has set forth below a number of matters with respect to which views, suggestions, comments and information are requested. Interested persons, however, are encouraged to address any other matters they believe to be germane to the Department's consideration of fee and expense disclosure issues.

Request for Information

Disclosure of information relating to plan investment options

1. What basic information do participants need to evaluate investment options under their plans? If that information varies depending on the nature or type of investment option (options offered by a

registered investment company, options offered under a group annuity contract, life cycle fund, stable value product, etc.), please include an explanation.

2. What specific information do participants need to evaluate the fees and expenses (such as investment management and 12b-1 fees, surrender charges, market value adjustments, etc.) attendant to investment options under their plans? If that information varies depending on the nature or type of option, or the particular fee arrangement relating to options (e.g., bundled service arrangements), please include an explanation.

3. To what extent is the information participants need to evaluate investment options and the attendant fees and expenses not currently being furnished or made available to them? Should such information be required to be furnished or made available by regulation or otherwise? Who should be responsible for furnishing or making available such information? What, if any, additional burdens and/or costs would be imposed on plan sponsors or plans (plan participants) for such disclosures?

4. Should there be a requirement that information relating to investment options under a plan (including the attendant fees and expenses) be provided to participants in a summary and/or uniform fashion? Such a requirement might provide that: A) all investment options available under a participant-directed individual account plan must disclose information to participants in a form similar to the profile prospectus utilized by registered investment companies; or B) plan fiduciaries must prepare a summary of all fees paid out of plan assets directly or indirectly by participants and/or prepare annually a single document setting forth the expense ratios of all investment options under the plan.³ Who should be responsible for preparing such documents? Who should bear the cost of preparing such documents? What are the burden/cost implications for plans of making any recommended changes?

5. How is information concerning investment options, including information relating to investment fees and expenses, communicated to plan participants, and how often? Does the information or the frequency with which the information is furnished depend on whether the plan is intended to be a section 404(c) plan?

6. How does the availability of information on the internet pertaining to specific plan investment options, including information relating to investment fees and expenses, affect the need to furnish information to participants in paper form or electronically?

7. What changes, if any, should be made to the section 404(c) regulation, to improve the information required to be furnished or made available to plan participants and beneficiaries, and/or to improve likelihood of compliance with the disclosure or other requirements of the section 404(c) regulation? What are the burden/cost implications for plans of making any recommended changes?

8. To what extent should participant-directed individual account plans be required to provide or promote investment education for participants? For example, should plans be required or encouraged to provide a primer or glossary of investment-related terms relevant to a plan's investment options (e.g., basis point, expense ratio, benchmark, redemption fee, deferred sales charge); a copy of the

Department's booklet entitled "A Look at 401(k) Fees" (www.dol.gov/ebsa/publications/401k_employee.html) or similar publication; or investment research services? Should such a publication include an explanation of other investment concepts such as risk and return characteristics of available investment options? Please explain views, addressing costs and other issues relevant to adopting such a requirement.

Disclosure of information relating to plan and individual account administrative fees and expenses

9. What information is currently furnished to participants about the plan and/or individual administrative expenses charged to their individual account? Such expenses may include, for example: audit fees, legal fees, trustee fees, recordkeeping expenses, individual participant transaction fees, participant loan fees or expenses.

10. What information about administrative expenses would help plan participants, but is not currently disclosed? Please explain the nature and usefulness of such information.

11. How are charges against an individual account for administrative expenses typically communicated to participants? Is such information included as part of a participant's individual account statement or furnished separately? If separately, is the information communicated via paper statements, electronically, or via website access?

12. How frequently is information concerning administrative expenses charged to a participant's account communicated?

13. What, if any, requirements should the Department impose to improve the disclosure of administrative expenses to plan participants? Please be specific as to any recommendation and include estimates of any new compliance costs that may be imposed on plans or plan sponsors.

14. Should charges for administrative expenses be disclosed as part of the periodic benefit statement required under ERISA section 105?

General questions

15. What, if any, distinctions should be considered in assessing the informational needs of participants in plans that intend to meet the requirements of section 404(c) as contrasted with those of participants in plans that do not intend to meet the requirements of section 404(c)?

16. What (and what portion of) plan administrative and investment-related fees and expenses typically are paid by sponsors of participant-directed individual account plans? How and when is such information typically communicated to participants?

17. How would providing additional fee and expense information to participants affect the choices or conduct of plan sponsors and administrators, and/or that of vendors of plan products and services? Please explain any such effects.

18. How would providing additional fee and expense information to participants affect their plan investment choices, plan savings conduct or other plan related behavior? Please explain any such

effects and provide specific examples, if available.

19. Please identify any particularly cost-efficient (high-value but inexpensive) fee and expense disclosures to participants, and to the contrary any particularly cost-inefficient ones. Please provide any available estimates of the dollar costs or benefits of such disclosures.

Signed at Washington, DC, this 20th day of April, 2007.

Bradford P. Campbell,
Acting Assistant Secretary,
Employee Benefits Security Administration,
Department of Labor.

1 See Final Regulation Regarding Participant Directed Individual Account Plans (ERISA Section 404(c) Plans), 57 FR 46,906 (Oct.13, 1992) (codified at 29 CFR § 2550.404c-1). This regulation may be accessed at www.dol.gov/dol/allcfr/title_29/Part_2550/29CFR2550.404c-1.htm.

2 This advisory opinion may be accessed at www.dol.gov/ebsa/regs/aos/ao2003-11a.html (September 8, 2003).

3 See recommendations of the GAO as set forth Report GAO-07-21 (November, 2006), www.gao.gov/htext/d0721.html.

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