



AMERICAN BENEFITS  

---

COUNCIL

Testimony of Douglas O. Kant  
Senior Vice President and  
Deputy General Counsel  
Legal Department, FMR Corp.

On Behalf of  
The American Benefits Council

Before the  
2007 ERISA Advisory Council  
Working Group on Participant Benefit Statements

Washington D.C.  
July 12, 2007



I am an employee benefits lawyer in the Legal Department of FMR Corp., the parent company of a group of financial service companies known as Fidelity Investments (“Fidelity”). My legal practice focuses on the Fidelity affiliates that provide record keeping, investment management, and trustee or custodial services to thousands of Internal Revenue Code (“Code”) Section 401(k) plans and Code Section 403(b) programs covering millions of employees and their beneficiaries.

I also serve as a member of the board of the American Benefit Council (“Council”) on whose behalf I am testifying today. The Council’s members are primarily major U.S. employers that provide employee benefits to active and retired workers and that do business in most if not all states. The Council’s membership also includes organizations that provide services to employers of all sizes regarding their employee benefit programs. Collectively, the Council’s members either directly sponsor or provide services to retirement and health benefit plans covering more than 100 million Americans.

We appreciate this opportunity to provide comments to the ERISA Advisory Council of the U.S. Department of Labor (“DOL”). My comments today relate to Section 508 of the Pension Protection Act of 2006 (the “Act”). In Section 508, Congress imposed new periodic reporting requirements on retirement plans in place of the “upon request” regime previously in place under the Employee Retirement Income Security Act of 1974 (“ERISA”). Under the Act, defined contribution plans are generally subject to an annual statement requirement and defined benefit pension plans must provide participant statements on a three-year cycle. In the case of participant-directed defined contribution plans, however, the Act requires account statements for participants on a quarterly basis.

We applaud the positive approach taken by the DOL staff in issuing transitional guidance in Field Assistance Bulletin No. 2006-3 (the “FAB”). The transitional guidance acknowledged the substantial time and expense that would be incurred by service providers (and consequently, plan sponsors and plan participants) in complying with the new requirements. We want to begin our comments by emphasizing that the Department

should continue to keep these concerns in mind in the development of final guidance under Section 508 of the Act.

Procedural Issues:

Notwithstanding the legal framework at that time, the provision of participant account statements on a quarterly (or monthly) basis was generally followed as a practice in the 401(k) market in the 1980's and 1990's. Plan sponsors and vendors alike recognized the need to provide participants who are empowered to make investment decisions with more current information about their account investments. Even the production of statements on a monthly basis, however, meant that the information was several weeks old and thus relatively "stale" by the time it was put into the hands of plan participants.

Improvements in Internet technology and a drastic increase in Internet use by the employee population in this country have permitted a better solution in recent years. Fidelity now provides plan participants with the ability to review the status of their account investments online in "real time" so that, for example, a participant can see his or her account investment in mutual funds as valued as of the market close on the preceding business day. We understand that other major vendors have pursued an Internet solution as well. This gives the participant more current information in order to decide whether some change in account investments would be in order. The plan sponsor community has responded quite positively to these developments.

The Fidelity website is designed to allow the participant to see his or her account investments listed simply by fund and current value. The participant can then access additional information (e.g., fund performance over specified periods) by clicking on designated hyperlinks. This approach has the dual advantage of reducing delivery costs and yet providing participants with the most relevant information. Of course, for participants who lack effective Internet access or who may prefer written statements, they

may request that written statements be furnished on a periodic basis. Plan participants are notified of their right to request written statements if they prefer.

Following passage of the Act, Fidelity shared information with the DOL with respect to recent experience with making information available via the Internet compared with other means. The data appears to confirm that participants do take advantage of Internet access and visit the plan website for information and, assuming the plan sponsor has authorized it, to execute investment and other plan transactions.

After citing a portion of the Technical Explanation of the Act prepared by the Joint Committee on Taxation staff, the FAB states that the Department will view the continuous availability of pension benefit information on a secure website to constitute "good faith" compliance, provided that participants are notified of the availability of statement information and how to obtain access. The FAB focuses on the medium and frequency of notices of statement availability provided to participants. The FAB states that the notice may be "furnished in any manner that a pension benefit statement could be furnished under this Bulletin." The delivery methods specified in the FAB are those described in the DOL electronic delivery regulations issued in 2002 and the Internal Revenue Service/Treasury electronic delivery regulations issued in October of last year.

We believe that DOL should reaffirm the FAB position regarding Internet access on a permanent basis. We believe that the ultimate beneficiaries of this position are the plan participants, due to timeliness of information, ease of access, and reduced expense.

Finally, the FAB requires that statements be provided within forty-five (45) days after the end of the relevant reporting period. We understand that for smaller recordkeepers, particularly if multiple vendors are involved, that time frame may be difficult to satisfy. At least with respect to defined contribution plans that do not provide for participant

directed investments, we think that the DOL should consider a longer period ending with the due date for the plan's annual return (Form 5500 series) filing.

It is equally important that the due date for a benefit statement for a defined benefit plan not fall before the due date for the Form 5500 for the year. In many cases, it can take months to gather all the data to establish the accrued benefits of all defined benefit plan participants. For large companies, this task requires assembling data on compensation and service from across the country, data that is often in different formats because of differences in payroll systems. Large companies are constantly acquiring new businesses and merging new plans into their plans, so there is also a need to learn new benefit formulas and new data requirements to determine the new employees' benefits. All of this can take a large part of the year.

It is true that with respect to defined benefit plan benefit statements, the statute authorizes the use of estimates under regulations prescribed by the Department. And we think that it is very important that the Department authorize the use of estimates. But there will be employers that do not want to use estimates because of the possibility of confusing participants, which is why the additional time is needed to determine benefits with more precision.

Format Issues:

The FAB provides that, pending the issuance of final guidance, it is the Department's view that good faith compliance with the Act's periodic statement requirements would not preclude the use of multiple documents or sources for benefit statement information. The critical condition for this position is that participants must be notified of the relevant details in any manner that a periodic statement may be furnished. The FAB provides an example of a plan administrator maintaining vesting information and another vendor maintaining investment information.

We do not believe that the statutory language would compel a different result in permanent guidance. In addition, we want to point out that investment information, which appears to be the main focus of Congress in enacting Section 508 of the Act, is often divided among several service providers.

For example, Fidelity's retail brokerage platform tracks brokerage investments separately from the plan record keeping system that tracks "designated alternative" positions. We understand that the same approach applies in the case of brokerage features maintained by other vendors. Any effort to consolidate information from these different systems would require tremendous amounts of time and expense, without any real benefit to the recipient.

In the 403(b) market, as another example, each mutual fund group generally serves as the custodian and recordkeeps its investment positions separately. Insurance products are also recordkept separately by the issuing insurance company. Some 403(b) vendors are beginning to work on consolidated reporting, pursuant to which one vendor would recordkeep the funds or products of another vendor, but those efforts will take time and will provide only incremental improvements over time.

It is important to remember that the participants in question have made the decision to deal with more than one vendor. It should not surprise them if the investment information comes from more than one source. The number of sources will ultimately be determined by how many different vendors are selected by the participant.

Finally, It is important to remember that in each of these cases the information is stored on different reporting systems maintained by different organizations, whether the organizations are affiliated or not. The operational and compliance challenge to combine the information on these different systems would be immense.

Substantive Content:

The Act states that benefit statements must include any limitation on a participant's rights "under the plan", but the FAB provides that this statement disclosure need not include limitations imposed by investment vehicles or by applicable securities laws. This approach is particularly compelling with respect to mutual funds and group trust commingled pools, where such restrictions would be imposed by a third-party manager as a condition of participation. Limitations may also be imposed on a separately-managed or employer stock fund on a more customized basis, as determined by the investment manager or plan sponsor.

We also think that it may be most efficient to permit the plan sponsor or service provider to inform participants where/how to access such information when needed, rather than detail every limitation on the statement. In the alternative, periodic mailings may be required as limitations for one or more plan investments are changed by the decision-maker in question. Of course, consistent with the other procedures followed under Act Section 508 guidance, participants should always be given the ability to request a written summary of the plan limitations.

We question whether the disclosure of permitted disparity is required on DC plan statements, because of the statutory language. The accrued benefit in a defined contribution plan is the account balance rather than the contribution formula. We ask that the DOL confirm that a generic reference (for example, "see your summary plan description") would be sufficient for purposes of this provision under defined benefit plans. Confirmation that a cross reference to the summary plan description satisfies the vesting information requirement (as seems clearly authorized by the statute) would also be helpful.

As added by the Act, Section 105(a)(2)(B)(i) of ERISA states that the periodic statement for an individual account plan shall include the "value of each investment to which assets in



the individual account have been allocated". For most investment options offered under a 401(k), 403(b), or other defined contribution plan, this would be the market value of the assets in the fund, or contract value in the case of a stable value fund.

The answer is not so clear with respect to various types of annuity contracts and life insurance policies purchased under a defined contribution plan. For example, an annuity contract may guarantee a specific amount of monthly income beginning at age 65 (or other retirement age), which reflects the purpose of purchasing such a contract. The contract may have a surrender value, but that amount may differ from the amount used to determine the monthly income stream. We think that DOL should provide flexibility regarding how such products need be reported on the participant statement, so that plans may use whichever of these values is deemed to be most useful to the plan participant.

Finally, we note that, as stated in the FAB, the DOL is required to publish a model participant statement by August 18, 2007. We strongly recommend that any model notice published by the Department be furnished purely for educational purposes. We believe that current formats differ substantially from vendor to vendor and between plan sponsors. The sample diversification language published was a good example of helpful guidance. Required changes in the statement's format, on the other hand, would result in substantial implementation costs and significantly increase the lead time to bring statements into compliance.

\* \* \* \* \*

In closing, I would be please to respond to any questions or comments from members of the ERISA Advisory Council.

Thank you,

Douglas O. Kant