



September 8, 2008

Filed Electronically

Office of Regulations and Interpretations  
Employee Benefits Security Administration  
Attn: Participant Fee Disclosure Project  
Room N-5655  
U.S. Department of Labor  
200 Constitution Avenue NW  
Washington, DC 20210

Re: Comment on Proposed Participant Fee Disclosure Regulations

Dear Sir or Madam,

The American Benefits Council (Council) appreciates the opportunity to comment on the proposed regulations concerning participant fee disclosure which were issued in July 2008. 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.

We would like to start by recognizing and commending the very significant efforts made by the Employee Benefits Security Administration (EBSA) in these proposed regulations. The Council shares EBSA's goal of ensuring that plan participants have the information they need to make appropriate investment selections among the investment options offered under their participant-directed individual account retirement plans. The Council also appreciates that the benefits industry has changed significantly in the past 20 years and that EBSA is working diligently to provide guidance that weighs the need for appropriate, simple and easy-to-understand disclosure against potentially excessive costs and complexities of administration.

We provide below a number of suggestions for improving the regulations.

## Effective Date

As proposed, the regulations would be effective for plan years beginning on or after January 1, 2009. For calendar year plans, presumably this means that new participants on or after January 1, 2009, would need to be provided with the information required upon eligibility and that all participants and beneficiaries would need to be provided with the information due on a quarterly basis. We strongly recommend a delay in the effective date of the final regulations. If final regulations are issued before the end of 2008, the Council recommends the regulations be effective for plan years beginning on or after January 1, 2010. Alternatively, if the regulations are not issued until 2009, the regulations should be effective for plan years beginning at least 12 months after issuance of the final regulations.

We believe that the proposed effective date is unrealistic. As a threshold matter, we are not aware of any proposed regulations that have had such a short time between finalization and the effective date. Simply put, the proposed effective date would be unprecedented. It would also be extremely difficult, if not impossible, for plan fiduciaries and plan service providers to analyze the final regulations shortly after publication and synthesize them into necessary systems changes to compile the needed information in time for a 2009 effective date. Moreover, Internet websites, which would be required under the proposed regulations, are not currently maintained for some designated investment alternatives, such as collective trusts, separately managed account options, and employer stock funds. While one can assume that investment providers who market their products to retirement plans will be motivated to develop websites for making additional information about their products available, in the absence of clear guidelines describing the content requirements for such materials, it seems unlikely that plan sponsors could reasonably anticipate the development of such sites by January 1, 2009. Further, plan sponsors cannot expect that investment providers will assume the responsibility for creating a website for a plan's employer stock fund. This would mean that the initial task of creating websites for such products and for employer stock funds would fall squarely on the backs of plan sponsors. It would be enormously challenging and cost prohibitive for plan sponsors to construct these websites between the date the final regulations are published and a proposed effective date of January 1, 2009 for calendar year plans. The task of coming into compliance within an incredibly compressed timeframe would be further exacerbated by the many other competing priorities of plan sponsors and their service providers, including the new Schedule C to the 2009 Form 5500 and the pending final regulations under section 408(b)(2) of ERISA.

It should, however, be permissible for a plan fiduciary to rely on the final regulations prior to its effective date. Specifically, EBSA should clarify that plans may comply with the proposed regulations prior to the effective date for purposes of satisfying the disclosure requirements of section 404(c) of ERISA. The proposed regulations have the virtue of eliminating some of the compliance challenges associated with the existing

disclosure requirements of section 404(c) and we anticipate that some plans will wish to transition to the new regulations in an accelerated time frame.

Aside from our concerns about the early effective date, the Council also has concerns about ensuring that the transition to the new rules is smooth and avoids unnecessary disruption. To this end, we urge EBSA to give careful consideration to the manner in which the final regulations are made effective. Our experience has often been that the transition to new rules can be challenging unless significant attention is paid to transition considerations. A basic question that will have a significant effect is what disclosures will be required for existing participants and beneficiaries as of the effective date. The Council recommends that the final regulations clarify that existing participants and beneficiaries need only receive the required annual disclosure by the end of the plan year in which the final regulations are made effective. Further, the Council requests a reasonable delay in the quarterly disclosure requirements due to the need to revise computer systems to collect the information. This would also have the related advantage of ensuring that the first quarterly statements need not include information for a period prior to the effective date of the final regulations. This data may not have been tracked and may be difficult to compile given that systems will often not be in place prior to the effective date of the regulations.

### **Method of Delivery**

Electronic Delivery. The proposed regulations contemplate a significant amount of information that would need to be provided to millions of plan participants. Under current EBSA guidance, electronic delivery is only permitted to eligible employees and participants who either have access to documents electronically through their worksite as an integral part of their work duties or affirmatively consent to electronic delivery. As EBSA is aware, these restrictive standards have greatly limited the utility of paperless means of providing requisite notices. In this regard, plan fiduciaries routinely rely on recordkeepers to fulfill disclosure requirements. Recordkeepers cannot determine whether participants have access to documents electronically through their worksite. Therefore, as a practical matter, most plans would need to obtain affirmative consent to electronic delivery under the current rules.

It is important that the final regulations facilitate electronic delivery to the extent appropriate. We understand that EBSA may be unable to propose a significant rewrite of its electronic delivery guidance prior to finalizing the participant-level fee disclosure regulations. Therefore, the Council recommends that EBSA facilitate these disclosures by providing interim electronic delivery guidance, such as the guidance provided in the Field Assistance Bulletin 2006-3 relating to delivery of participant benefit statements (allowing web posting if notice of its availability is provided). In addition, since some of the required information can be provided on quarterly statements, it would be reasonable to allow similar electronic delivery for all of the required participant fee

disclosure. Any other approach would greatly limit the extent to which existing information delivery vehicles could be used to satisfy the new regulations.

Website. The Council commends EBSA for allowing use of a website for providing required supplemental information. In addition to the above requests for clarification on electronic delivery in general, we specifically request clarification that neither participant consent nor paper disclosure will be required for the web posting of supplemental information. Plan sponsors and their service providers are understandably concerned that websites with drill-down links do not lend themselves to providing separate paper disclosure. Requiring paper in this situation would not facilitate access to more information and could even create an incentive to slim down the website information so that providing paper disclosures would not become too onerous. Moreover, the regulations already require delivery of a prospectus for a registered fund or a similar document for a non-registered fund. As a result, participants and beneficiaries that do not have ready access to a website will be able to request supplemental information that is largely comparable to the information that is available through the website for a designated investment alternative.

The regulations should also provide interested parties with direction as to the information that is required, and the manner of disclosure, if plan investment options do not have information posted on a website (such as would be the case for some non-mutual fund investment options). As drafted, the proposed regulations merely require the use of a website, list a number of examples of data elements that would be available through the website, and suggest that other items may also be required. We are concerned that the proposed regulations, as drafted, will not provide sufficient guidance to providers that are constructing websites for the purpose of complying with the final regulations. Further guidance will also be important for investment types, such as company stock funds and limited partnerships, which will need direction in terms of the key supplemental information that needs to be disclosed.

We are reluctant, however, to recommend the creation of a list of required website elements because it will be almost impossible to develop a single list that will be appropriate for all types of investment options. Even if such a list were developed today, it will almost certainly be ill-suited to the next generation of retirement investments. Accordingly, we suggest that the final regulations include a comprehensive list of recommended elements. The list should be comprehensive in the sense that it should not include a “catch-all” that might suggest an open-ended duty to disclose other unidentified items. The final regulations should also explicitly acknowledge that the list may include elements that are not appropriate for some investments.

A comprehensive list would also offer a vehicle for the paper delivery of supplemental information if it is not cost effective to build a website (for example, a company stock fund). In this regard, it should be permissible for a fund to make available in paper

copy the type of information that could be provided through a website. Put differently, the website requirement should not be mandatory for all types of investments or all aspects of a particular type of investment but rather should be an option for making available supplemental information about a plan's designated investment options.

### **Disclosure Upon Eligibility**

The proposed regulations would require disclosure of a range of plan-related and investment-related information to each participant or beneficiary "on or before the date of plan eligibility." This timing requirement may be very difficult for many plans to satisfy and we urge EBSA to consider a more flexible rule.

There are a number of reasons for a more flexible approach. First, it is not uncommon for plan service providers to take primary responsibility for providing disclosure material. However, it is very difficult for service providers to track eligibility as opposed to enrollment.<sup>1</sup> Second, many plans provide for immediate eligibility for various classes of covered employees and, in some settings, it is simply not practical to provide the required disclosures on the first day of employment. Other plans provide immediate eligibility for certain types of contributions, including, for example, rollover contributions. As a result, there would be numerous instances in which the requisite notices would be due on the first day of employment. Third, in many companies, benefits are administered in one place and hiring in another (especially for large companies with multiple locations). As a result, even apart from immediate eligibility, the chances of a slight delay between eligibility and provision of the requisite notice is significant.

There are also instances in which it is simply not possible to provide the notices upon eligibility. Consider, for example, a beneficiary that acquires an interest in the plan upon the death of the participant. As we understand the proposed regulations, notice to the beneficiary would be due upon such date. A plan administrator may not know for some time that a participant has died, particularly if the participant is terminated with a vested account balance. Once the plan administrator has been informed of a participant's death and identified the participant's beneficiaries, moreover, it could take some time for the plan administrator to notify the service provider and for a service provider to establish an account in the beneficiary's name.

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<sup>1</sup> This challenge is exacerbated by EBSA's electronic delivery rules, which, as mentioned above, effectively require affirmative consent to electronic delivery. The primary mechanism many recordkeepers use to obtain consent to electronic delivery of information is to obtain it when eligible employees first log on to a participant website to enroll in the plan, which is often after these employees have already met their plan's eligibility requirements (and after the initial notice is required). As a result, under an eligibility rule, we are concerned that, in practice, many plans would be required to send initial and annual notices through the mail at substantially greater cost. This cost is borne, in many cases, by the participants who do elect to participate in the plan, thereby reducing retirement savings.

For these reasons, we recommend that a plan fiduciary be permitted to provide the initial disclosure on or before the date of the first investment made on behalf of a participant or as soon as administratively practical thereafter. We believe that this rule is appropriate in order to build some flexibility into the timing requirement. A prudent plan fiduciary should have the ability to balance the costs and benefits of disclosure and determine that a notice may be provided shortly after a participant's initial investment if it would be inordinately expensive to provide the notice as of an earlier date. Moreover, a bright line rule such as the rule contemplated by the proposed regulations, could result in numerous technical breaches of fiduciary duties and raise difficult questions about how such breaches could be corrected. More generally, a bright line rule is inconsistent with the fundamental notion of fiduciary prudence, which takes into account all of the facts and circumstances, including the cost to the plan and the benefits to participants.

We also recommend two clarifications related to beneficiaries. First, it should be permissible for a plan to provide the requisite notice to a beneficiary as soon as administratively practicable after the plan administrator is notified of the death of the participant. This would allow the plan administrator to identify the beneficiary and to communicate with service providers. Second, to avoid any confusion, EBSA should confirm that plans need not provide any notices or disclosure to beneficiaries before the death of the participant. The proposed regulations frequently refer to notices and disclosure to "participants and beneficiaries" and these references can be somewhat confusing. For example, the proposed regulations could be read to suggest that beneficiaries need to receive the notice due in connection with initial plan participation. We assume, however, that this is not meant to refer to the participant's initial participation.

### **Disclosure Methodology**

Administrative fees. The proposed regulations distinguish between plan-related information and investment-related information. Plan-related information is further divided into three categories: (1) general plan information, (2) administrative expense information, and (3) individual expense information. Council members find it very useful that the investment-related expenses can be provided as formulas rather than translating the formulas to actual dollar amounts. Actual dollar amounts must be provided, on a quarterly basis, for expenses charged on an individual basis (such as loan origination fees) and certain fees and expenses for plan administrative services.

The Council recommends that EBSA clarify that administrative fees and expenses included in investment-related fees are subject to the disclosure for investment-related information and need not be part of the dollar amounts disclosed on a quarterly basis. Paragraph (c)(2)(i) makes such a distinction ("an explanation of any fees and expenses for plan administrative services (e.g., legal, accounting, recordkeeping) that, *to the extent not otherwise included in investment-related fees and expenses*, may be charged to the

plan...”) [emphasis added]. However, paragraph (c)(2)(ii) relating to the quarterly disclosure of actual dollar amounts does not contain the same language. The Council believes that section (ii) is simply requiring the quarterly disclosure in dollar amounts of the expenses already identified in (i) but clarification would be extremely helpful.

To this end, EBSA should clarify that the costs of recordkeeping, etc. that are (i) included in fund expense ratios or (ii) calculated as part of a fund’s net asset value (NAV), are not required to be separately reported under (c)(2)(i) and (ii) as individual dollar amounts and that quarterly disclosure of these amounts is not required. The Council seeks this clarification because participants could be misled by a duplicative disclosure of administrative expenses in specific dollar amounts when at the same time a fund already may have such expenses factored into its expense ratios and NAVs. Additionally, at this time requiring a breakdown of actual dollar expenses on a per participant basis when NAVs and expense ratios are disclosed would be economically and administratively burdensome as significant changes to accounting systems would be needed to comply with the proposed regulations.

Plan-Wide Administrative Expenses. As mentioned above, upon enrollment and annually thereafter, the proposed regulations require “an explanation of any fees and expenses for plan administrative services that may be charged to the plan.” However, a list of all potential fees and expenses would be long and it is not reasonable to expect a plan fiduciary to foresee all possible expenses that may be charged. For example, a plan administrator may not generally retain legal counsel to advise on plan issues but might need to in the event an unexpected issue arises. For these reasons, the Council recommends that the initial notice provide a representative sampling of the types of fees and expenses that might be charged. The initial disclosure could describe the plan’s provisions regarding payment of administrative expenses from the trust, describe how such expenses are allocated across participant accounts, and provide some reasonable examples of such fees and expenses.

### Individual Expenses

The proposed regulations also require, upon enrollment and annually thereafter, “an explanation of any fees and expenses that may be charged against the individual account of a participant or beneficiary for services provided on an individual, rather than plan, basis.” For many plans, this list would be very long and many of the possible expenses would be fairly remote. In this regard, for example, we question how useful advance notice of any charges associated with a QDRO would be for the vast majority of participants and beneficiaries. Instead, we suggest that plan fiduciaries provide notice that there are individual expenses for particular services, notice that a list of these services and related expenses is available, and advance notice of any expenses prior to incurring such expenses.

Some members have expressed a concern that the proposed regulations contemplate that all individual expenses will need to be disclosed on a single statement for each quarter. This concern is based in part on the language of the proposed regulations but also upon the expectation that much of the quarterly disclosure will be accomplished through the quarterly benefit statement process. Our members report, however, that there is relatively little unused room on the quarterly benefit statements and that a separate communication just for the purpose of memorializing and compiling individual expenses would be burdensome. Rather, it should be more reasonable for members to use “confirmation statements” to inform participants and beneficiaries of individual expenses. These statements would typically be issued in connection with an individual expense and would satisfy the monetization and explanation requirement in the proposed regulations. The only possible difference is that there would not be a single piece of paper showing consolidated expenses if a participant or beneficiary incurred more than one individual expense. We submit that because the expenses are incurred separately for discrete transactions that the separate disclosure is more meaningful to participants, and we request that the final regulations confirm that confirmation statements are an acceptable form of quarterly disclosure for individual expenses.

Investment-Related Fees. The Council commends EBSA for emphasizing its recognition that fees are not the only factor one should consider when investing by requiring a statement to that effect in the disclosure materials. However, the Council is still concerned that placing such a great emphasis on fee disclosure could discourage participants from saving for retirement. EBSA could mitigate this potential effect by requiring a further statement that many investment-related fees apply regardless of whether a person invests through a tax-qualified retirement plan or through a retail investment vehicle, and that those fees are often higher when incurred through retail products where the plan’s aggregate buying power is lost.<sup>2</sup>

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<sup>2</sup> We note that in Field Assistance Bulletin 2008-03, dated April 29, 2008, EBSA indicated that it anticipated that furnishing the information required under the participant fee disclosure regulation would satisfy the investment-related fee and expense disclosures required by section 2550.404c-5(d)(3) of the regulations on qualified default investment alternatives. However, the proposed regulations do not address this issue. The investment-related information required to be disclosed by reference to an Internet web site in the proposed regulations includes the information that EBSA has indicated should be provided in the description of a default investment alternative, at section 2550.404c-5(d)(3). This includes a description of the investment objectives, risk and return characteristics as well as fees and expenses. In addition, the timeframe for providing both disclosures is substantially similar. Thus, to reduce the costs associated with duplicative disclosures, we request that the final regulations clarify that compliance with the regulations also satisfies the requirement to provide investment-related information required at section 2550.404c-5(d)(3).

## **Benchmarking**

The proposed regulations would require the plan fiduciary to provide the name and returns of “an appropriate broad-based securities index” which is not administered by the investment provider or its affiliates for each designated investment alternative other than one with a fixed rate of return. The Council appreciates the importance of benchmarking but suggest a number of clarifications below.

First, the language in the proposed regulations can be read to suggest that only one index is appropriate. The Council urges EBSA to clarify that it is acceptable to use a combination of indexes in certain situations. In this regard, for example, it should be acceptable to use a blend of an equity index and a bond index to benchmark a life cycle fund or a balanced fund. Use of only one index, such as a pure equity index or a pure bond index would not provide “apples-to-apples” comparative information.

Second, there are some funds that provide a non-fixed return for which it should be acceptable to omit a benchmark. As EBSA is aware, in recent years, there has been a substantial increase in the popularity of, and use of, funds, such as target date funds and life cycle funds, that change their asset allocations and associated risk levels over time with the objective of becoming more conservative with increasing age. One question that the proposed regulations raise is how such funds should be benchmarked. To the best of our knowledge, there is no prevailing consensus as to an appropriate benchmark for such investments. We believe that some plans will be comfortable with creating benchmarks, for example, from blends of available indexes. However, other plans may determine that existing benchmark comparisons are flawed. It should be reasonable for such plans to omit a benchmark and provide an annotated explanation of why a benchmark was omitted.

Third, plan fiduciaries are concerned about the selection of benchmarks and whether the selection might be considered a fiduciary act. The Council recommends that the final regulations make it clear that plan fiduciaries can properly rely on the benchmarks assigned to their funds by third-party rating services or investment managers (e.g., Ibbotson Associates) unless the fiduciary knows the benchmark is inappropriate. Plan fiduciaries should not be forced to make this determination and hire experts for the sole purpose of determining benchmarks. The cost associated with such an approach would clearly not be justified by the related expenses.

Fourth, a particularly important issue is the extent to which plan fiduciaries should provide a benchmark for company stock and, if so, the criteria that is relevant to benchmarking a company’s individual stock. It would be very helpful if the Department provided guidance explicitly confirming that it is appropriate to benchmark an employer stock fund against a market index. In addition, it would be appropriate for the final regulations to provide guidance on the appropriate considerations in selecting a benchmark for an employer stock fund.

## **Specific Types of Investments**

Employer Stock Funds. The proposed regulations do not explicitly address employer stock funds. They are, however, fairly common investment options in individual account plans and it is important that the Department provide guidance on the unique characteristics of employer stock funds. There are questions, for example, about whether a plan that pays company stock fund dividends directly to participants under section 404(k) of the Internal Revenue Code should disclose this feature as an investment feature. A similar question is raised to the extent that company stock may enjoy the benefits of the tax treatment associated with net unrealized appreciation.

Open brokerage windows. The disclosure requirements in the proposed regulations apply to investment alternatives that are designated by the plan and do not apply to open brokerage windows. The Council recommends that this exception be expanded to apply to very broad categories of investments such as access to every mutual fund offered by a large mutual fund company. It is not cost-effective to provide disclosures for hundreds of funds which would result in reduction of investments available to participants. The Council recommends that EBSA clarify that in plans with numerous investment alternatives, plan fiduciaries be permitted to “designate” investment alternatives that would be subject to the appropriate disclosure with information on other alternatives limited to references to publicly available information. EBSA could provide appropriate safeguards applicable to the designations such as a required number of designated alternatives that are properly diversified.

Fixed accounts. The proposed regulations draw a distinction between non-fixed investments and fixed investments, such as a guaranteed investment contract (“GIC”). For fixed investments, some of the elements of disclosure, such as a benchmark, are not required. Instead, the plan fiduciary must disclose the fixed rate of rate and the term of the investment. The Council appreciates this approach but believes it is important to further clarify how these requirements should be satisfied in certain contexts. It is not uncommon, for example, for an insurance product to provide that the insurer has the right to change the rate of return on a prospective basis at any time. This right may or may not be associated with a minimum interest rate. Similarly, an insurance product may guarantee an investment return for a number of years or only for a single month. The Council recommends that plan fiduciaries have the flexibility to provide annotated or footnote disclosure related to both the rate of return and the term of the investment for investments that do not fit perfectly within the fixed or non-fixed categories. For example, for an investment that has a fixed rate of return for a one-month period, it may be appropriate for a plan fiduciary to disclose on the comparative chart the most recent one-month rate with a footnote explaining the insurer’s right to reset the rate prospectively. Similarly, it may be appropriate for the fiduciary to disclose the historic rates of return on a composite basis, for example, the average monthly rate over the relevant periods, such as a one-year period. The key is simply that the disclosure

provide participants and beneficiaries with all of the material information about the investment.

Fixed Annuities. There are also a number of annuity purchase programs under individual account plans for which additional guidance is appropriate. For example, a plan may provide participants the opportunity to purchase a fixed annuity payable at a later date. The purchase price may be based on current interest rates and mortality tables. As a threshold matter, these products are more akin to fixed investments than non-fixed investments. However, it would be difficult to determine a fixed interest rate for these products given the mortality factor. Further, it is far from clear what the term of the investment would be. It might be possible to address a number of issues through footnote disclosures and the use of “not applicable” coding. However, some fiduciaries will be concerned that the extensive use of footnotes and asterisks could create a bias away from these investments. For these reasons, the Council recommends that the final regulations authorize more than one approach to disclosure. This may, for example, involve listing the insurance product on the comparative chart and annotating the various disclosures. Alternatively, it could involve a narrative description of the product off the chart. For example, a plan fiduciary might disclose in narrative form the most recent annuity at normal retirement age that is purchased with a certain premium amount.

Insurance Guarantees. In recent years, there have also been a number of new insurance products that are designed to provide insurance guarantees in connection with traditional non-fixed investment funds. There are a wide range of these guarantees, including guaranteed minimum income benefits that provide participants with the right to annuitize a variable annuity contract at the greater of the market value of an investment fund or a notional value. This effectively provides participants with protection against market declines. The Council recommends that the final regulations provide more than one acceptable approach to disclosure. It should, for example, be permissible to include the guarantee itself as an investment option on the comparative chart apart from the underlying fund. This may make sense where the guarantee is an option. Alternatively, it may make sense to disclose the investment on an integrated basis. Yet another reasonable approach would be to disclose the right to purchase a guarantee separately from the comparative chart. Our point is simply that there is no “right” approach to disclosure and that the final regulations should approve more than one approach.

Separate Accounts. It is not uncommon for individual account plans to offer investment options through an insurance company separate account. The separate account may include a fee and the subaccount investment options will typically have fees comparable to the fees associated with any investment fund, such as a mutual fund. The proposed regulations include a broad list of investment-related fees that are referred to as “shareholder-type fees” that would be disclosed apart from total annual operating expenses. We believe that it should be acceptable to include a separate

account fee either as part of the total annual operating expenses of each subaccount investment or as a shareholder expense. Either approach would illustrate the effect the fees have on the rate of return. The key is simply that full and complete disclosure be made. The particular category should not be significant.

### **Fiduciary Concerns**

Litigation risk. Many plan fiduciaries are concerned about potential litigation risk with respect to their defined contribution plans. This concern is understandable since plaintiff's law firms have filed numerous lawsuits in recent years. Language in the preamble of the proposed regulation has increased that concern for some plan fiduciaries.

The preamble language indicates that EBSA believes Sections 404(a)(1)(A) and (B) impose on fiduciaries a duty to furnish participants and beneficiaries information necessary to carry out their account management and investment responsibilities in an informed manner. The preamble goes on to state that prior to issuance of final regulations, 404(c) plans should have satisfied 2550.404c-1(b)(2)(i)(B), but that EBSA expresses no view with respect to non-404(c) plans as to the specific information that should have been furnished to participants and beneficiaries before the regulation is finalized.

The Council would recommend clarification of the indicated language so that plaintiffs' attorneys are not motivated to sue plans, both 404(c) and non-404(c) compliant, for alleged violations of 404(a) because the disclosure did not meet the specific requirements of the proposed regulations. While the Council understands and appreciates the need to expand the requirements of the proposed regulations beyond 404(c) compliant plans, Council members are concerned that litigators may read a "litigation approved" gloss into the language of the preamble. At the very least, EBSA should make clear that fiduciaries could meet their 404(a) obligations without meeting the new regulatory requirements prior to the effective date of the regulations.

Pass-through relief. Plan fiduciaries will inevitably be partially dependent on service providers for much of the information that will be disclosed to participants and beneficiaries, and some service providers will be dependent on other service providers for some of the information they pass along. The proposed regulations, however, do not provide fiduciaries or conduit service providers with any relief for reasonable reliance. The preamble to the regulations does include a footnote suggesting that relief for fiduciaries would be appropriate in some circumstances. The Council recommends that EBSA move this suggested relief into the actual regulation and include relief for service providers receiving information from other service providers. Of course, such relief would not be available if the fiduciary or service provider knew the information was incomplete or inaccurate.

## Administrative Complexity

Redemption fees. In lieu of identifying specific redemption fees charged by each individual investment, the Council recommends that EBSA only require a statement that redemption fees may apply if participants engage in market timing and short term trading practices, which generally are not appropriate investment strategies under a retirement plan. Information on redemption fees should not be a strong consideration for eligible employees in deciding whether to participate in a plan. Participants should not be engaging in short term “market timing” activities, but rather should be investing with a long term view toward retirement savings.

The provision of such information may have the unintended consequence of discouraging eligible employees and participants from participating, as they may place inordinate weight on the fact that redemption fees may be applied, when such fees should rarely apply. Setting forth a long list of market timing fees would require substantial and expensive programming to create such lists and such fees are currently disclosed in prospectuses. A similar approach was followed under FAB 2006-3 for benefit statements with regard to trading restrictions imposed by investment vehicles.

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Again, we appreciate the opportunity to comment on the proposed participant disclosure regulations, and will provide additional comments as our members continue to analyze the proposal. We believe that the American Benefits Council offers an important and unique perspective of both the employer sponsors of retirement plans and the service providers that assist them, and we look forward to working with you on these important changes.

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  
Senior Counsel, Retirement Policy  
American Benefits Council