WELLS FARGO

Law Department
Wells Fargo & Company
MAC N9305-172
Sixth and Marquette
Minneapolis, MN 55479

Bradley J. Schlichting
Senior Counsel
Phone: 612/667-0816
Fax: 612/316-0805
Bradley.J.Schlichting@wellsfargo.com

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Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5669
U.S. Department of Labor
200 Constitution Avenue N.W.
Washington D.C. 20210

Attn: Participant Fee Disclosure Project

On behalf of Wells Fargo & Co. and its affiliates, I appreciate the opportunity to comment on the proposed regulations regarding participant fee disclosures. Wells Fargo agrees with the Department that participants should have fee disclosure information in an easy-to-understand format so they can make appropriate decisions regarding the investment of their retirement plan accounts. We applaud the Department's efforts to provide participants with such information. As a national provider of retirement plan products, Wells Fargo services retirement plans in which over a million individuals participate. In that capacity, Wells Fargo assists its clients in providing numerous disclosures and other information to those participants, and therefore has significant experience in handling participant disclosures and similar communications. Based on that experience, we have suggested possible changes to the proposed regulations which we believe would facilitate participant disclosures while at the same time being conscious of the cost involved, since in many (if not most) cases, participants themselves will ultimately bear the cost of the disclosures.

General Comments

Limit Disclosures to Individuals without Account Balances

The proposed regulation requires disclosures to participants and beneficiaries upon initial eligibility and annually thereafter. Under the Department's regulation §2510.3-3(d)(1)(ii), individuals become participants once they satisfy the plan's age and service requirements, even if they do not actually contribute to the plan. Therefore, the proposed regulation could be interpreted to require annual disclosures to all eligible employees, even those who choose not to contribute. This would be a significant cost to many plans, and those participants choosing to contribute to the plan would bear the costs associated with sending repetitive disclosures to those choosing not to contribute. The Department should limit the disclosures to participants without an account balance in the plan to only the initial disclosures until such participants actually decide to contribute to the plan (or otherwise have an account balance), at which point they would receive the annual disclosures as other participants do. With the initial disclosure, noncontributing participants still will have information necessary to help them decide if they want to contribute, yet the costs associated with sending annual disclosures to individuals who have elected not to contribute are contained. If such individuals would like a subsequent disclosure at a later date (e.g., perhaps their circumstances have changed so that they are reconsidering their decision to contribute), the regulation could allow such participants to request a disclosure.

Flexibility Should Be Allowed for the Timing of the Initial Disclosure

Requiring the initial disclosure on or before a participant's eligibility may not be feasible for many plans. Some plans have immediate eligibility, which would mean the disclosure would have to be given on the first day of employment; however, most plan administrators (often the employer or a committee of employees of the employer) rely on third-party service providers to give plan information out to participants as part of the enrollment process, because the service providers are often better equipped to handle distribution of information to participants. Yet those service providers generally would not immediately have the necessary information to send out the disclosures. The disclosures are most relevant to the participant upon enrollment. If the disclosures can be incorporated into the plan enrollment process, distributing the disclosures will be much more cost effective and meaningful to participants as the disclosures can be included with other relevant plan information received by the participant at the same time.

The Proposed Effective Date Will Not Be Feasible for Many Fiduciaries

The Department proposed that the regulation be effective for plan years beginning on or after January 1, 2009. After the Department considers the comments it receives and finalizes the regulation, there will be very little time left in 2008 to put such a large scale disclosure project into effect. Fiduciaries of large plans will have to mail thousands of disclosures and automation of some sort will be required to accomplish that. Service providers assisting fiduciaries with this task will have to make significant programming changes to their systems. A large amount of the information required by the proposed regulation on investments does not exist currently (e.g., collective fund and separate account performance calculations). For these reasons, we suggest the Department allow for at least one full plan year after finalizing the regulation before making it effective.

The Department Should Clarify "Fiduciaries"

The proposed regulation requires that "fiduciaries" give the disclosures to participants. Plans have multiple fiduciaries, such as a plan sponsor, plan administrator, trustee (directed or discretionary), investment managers, etc. Some fiduciaries, such as directed trustees or investment managers, have little direct involvement with participants and would not have the necessary information to send the disclosures. The regulation should clarify which fiduciary has this responsibility to avoid confusion; our presumption would be the plan administrator.

Comments on Plan-Related Information

Changes in Information Should Be Sent before the Effective Date, not the Adoption Date

In (c)(1)(ii), the proposed regulation requires that changes in the general disclosures be sent to participants within 30 days of *adoption*. Changes are often adopted well in advance of the effective date. Many participants would receive such information and then forget about it if the change was not effective until months thereafter. In addition, many, if not most, of the changes will relate to changes of the designated investment alternatives. Fiduciaries will often desire to utilize the fiduciary protection available for a "qualified change in investment options" under ERISA §404(c)(4). That section requires 30 – 60 days advance notice before the *effective* date of the change; coordinating those two provisions would avoid multiple notices of the same event – costs again which would be passed to participants.[1]

The Department Should Clarify "Designated Investment Managers"

In the section (c)(1)(i)(E) and the proposed 404(c) regulation changes, designated investment managers must be identified. Since the proposed 404(c) regulations require that the participant receive the disclosures under the proposed 404(a) regulations, the reference in the 404(c) proposed regulations seems duplicative and could be deleted.

In addition, it would be useful to clarify the Department's comment in the proposed regulation's preamble that the plan must note any designated investment managers "to whom participants and beneficiaries may give investment directions." This phrase does not appear in the regulation itself. In our experience, participants rarely give investment directions to an investment manager. Some participant-directed plans hire an investment manager to manage a customized portfolio that is an investment option in the plan, but participants still rarely would give investment instructions to the investment manager.

The Regulation Should Permit Aggregating Individual Expenses

The proposed regulation requires administrative and individual expenses actually charged to the participant's account to be disclosed quarterly. While the proposed regulation allows for reporting administrative expenses in the aggregate, as discussed in the preamble, it does not appear to have the same flexibility regarding individual expenses.

Most software used to run retirement plans has the ability to separately show expenses on participant statements; however, there are not endless options for each and every possible individual fee which could possibly occur – loans fees, distribution fees, QDRO review fees, managed account fees, etc. Redesigning computer systems and participant statements to have the ability to list every possible individual fee (in addition to a possible aggregate administrative fee) on a participant's statement could involve significant programming expense, again ultimately likely to be borne by the participants.[2] Participants are informed before incurring such fees what the fee may be by the initial and annual disclosure of

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[1] Similarly, many changes could also involve a blackout requiring a notice under ERISA §101(i), which generally requires 30-60 days advance notice before the effective date of the blackout. Coordination with this provision would also be possible by referring to the effective date of the change rather than the adoption date.

[2] While the proposed regulation does not require the use of participant statements to meet the quarterly reporting requirements, we presume that most fiduciaries will avail themselves of that existing quarterly communication as the natural method to disclose actual fees charged.

individual expenses under the regulation. The large majority of individual expenses (such as loan fees and distribution fees) are relatively fixed and do not frequently change, so participants will generally have an understanding of the fees charged to their account during a particular quarter from the annual disclosure of possible expenses. For these reasons, the regulation should permit reporting individual expenses in the aggregate along with the administrative expenses. We also suggest the regulation allow participants to enquire about what items are included in the aggregated total so that they have complete information as to what fees have been charged to their account during a particular quarter. This would allow for a simplified method of fee reporting yet still give participants access to information regarding the fees charged to their accounts.

Additionally, we would like to ask the Department to confirm that if a particular individual expense is disclosed when it is incurred, the regulation would not by itself require a second quarterly disclosure. For example, if during the process of receiving a participant loan, the participant is given information that the loan fee is $50, the disclosure of the loan fee during the loan process would itself satisfy the disclosure requirement of section (c)(3)(ii).

<u>The Department Should Clarify Reporting Aggregate Administrative Expenses</u>

In the preamble, the Department noted that administrative expenses may be reported in the aggregate if there is an indication of what expenses are included in that aggregate figure. However, it is unclear whether a fiduciary would have to change that indication quarterly if the items included in the aggregate number vary from quarter to quarter. For example, during some quarters legal expenses may be charged and in others there may not be any legal expenses. One quarter may have audit expenses, while the other quarters may not. Requiring a fiduciary to change the narrative on statements each quarter to note what is included in the "administrative expenses" line could be burdensome and lead to additional cost to the plan. Participants will be informed of the possible administrative expenses from the initial/annual disclosure. Therefore, the Department should clarify that fiduciaries may include general categories of expenses in the "administrative expenses" amount reported under section (c)(2)(ii) without having to vary the description slightly quarter to quarter. Similar to the comment above on individual expenses, the Department could modify the regulation to allow participants to enquire about the amounts included in the aggregate reported amount.

Comments on Investment Related Information

<u>Employer Stock Needs Special Consideration as an Investment Option</u>

Many plans allow participants to invest in qualifying employer securities as a designated investment option, often referred to as an employer stock fund. Many of the investment disclosure requirements would be difficult for fiduciaries to complete for employer stock funds, such as the type of option, a web site address with all the requirements noted in the proposed regulation (such as principal strategies and attendant risks), total operating expenses, and benchmarks. Performance data for employer stock funds can vary from the underlying stock itself if the fund holds a cash reserve to facilitate daily trading, if expenses are charged to operate the fund, or if the fund allows participants to elect to receive dividends in cash pursuant to Tax Code §404(k). Such funds would not be prepared to mimic mutual fund reporting of costs and performance required by the proposed regulation. For these issues, the Department should consider modifying the investment disclosure obligations for employer stock funds.[3]

Participant Loans Should Not Be Considered Investment Options

Participant loans could be considered to be a designated investment option under a plan. Disclosure of participant loans as a designated investment option should not be required as they are unique from the other possible investment options in a retirement plan. The Department should clarify that paragraph (d) does not apply to participant loans where the loan is allocated to the borrowing participant's account.

Disclosures for Created Investment Options Should Be Able to Rely on the Disclosures for the Underlying Funds

Some plans utilize "funds of funds," where the designated investment options are combined in various weightings to create customized balanced funds of sorts. Such funds are often referred to as "model portfolios." Model portfolios may be reported on participant statements as separate investment options, or they may be shown as investments in the underlying funds used to create the model portfolio. Model portfolios are utilized to help participants easily create an appropriate asset allocation for their risk tolerance, age, etc. Participants for their part have been very receptive to using model portfolios. However, if model portfolios are required to create their own website for more information, performance numbers, operating expenses, benchmarks, performance, etc. instead of being able to refer to the information for the underlying funds themselves, such options are no longer likely to be cost effective options for participants. Therefore, the regulation should allow investment tools such as model portfolios to utilize the information of the underlying investment options in the plan from which they are created to satisfy the disclosure obligations instead of having to fulfill the disclosure obligations as separate designated investment options.

The Department Should Clarify "Type or Category" of Investment Fund

The Department should clarify this requirement on investment reporting. For example, most consider an S&P 500 index fund to be a large cap fund,[4] but the Department noted that such a fund has its own category on its model comparative chart, and notes "index" as a fund category in the preamble. As virtually all index funds cite the index in the fund's name, this seems repetitive and of little value to participants. In addition, the regulation requires the disclosure to note if a fund is actively or passively managed. As all index funds are passively managed, and vice versa, noting that a particular fund is an index fund and also that it is passively managed seems duplicative. The Department should consider allowing fiduciaries to refer to various commercial services available (such as Lipper or Morningstar) for categorizing funds.

[3] These same concerns are prevalent for "legacy stock" funds, which should be addressed similarly. Legacy stock funds are investment options primarily invested in securities of a prior employer, usually due to a prior spin-off of plan assets. Many plans maintain legacy stock funds so participants can take advantage of the tax benefits associated with net unrealized appreciation under Tax Code §402(e).

[4] Commercial services, such as Morningstar, characterize them as such.

The Department Should Clarify Its Comments on Electronic Media

The Department requested comments on the requirement to note a website for participants to obtain additional information about an investment option and whether fiduciaries would have to furnish paper copies of supplemental information listed in the regulation. While fiduciaries should give the participant disclosures noted in the regulation, we would not interpret the regulation to require fiduciaries to do additional website research for the participant and provide paper copies of the information provided on the investment provider's website. Any such requirement would be burdensome for fiduciaries. Fiduciaries will not necessarily know which information on a website participants are interested in. Participants have internet access through numerous means – at home, work, public libraries, internet cafes, etc. The Department should clarify its comment if it feels paper disclosures of information on an investment provider's website would be required in certain circumstances (and allow further comment on that interpretation). Additionally, the Department could use this opportunity to revisit its regulation on electronic disclosures to make providing such electronic disclosure easier to individuals other than those who have access as an integral part of their employment.

Prospectus Delivery

Under the proposed disclosure and 404(c) regulations, prospectuses will be delivered upon request, and participants will have easier-to-read materials provided in the comparison chart noted in the regulation. We applaud and support the Department's efforts in this regard, as our experience has shown that few participants peruse a prospectus in its entirety. Our belief is that participants would find the comparison chart to be a much more useful tool than a prospectus for each investment alternative subject to the securities laws.

Investment Option Concerns

Requiring a website for more information is a concern for investment options other than mutual funds, such as collective funds and in-house managed funds. Our understanding is that the American Bankers Association has submitted comments on the effect the proposed regulation will have on collective funds and we agree with the issues noted in its letter.

The Department should also consider the various methods in which fees are charged to administer retirement plans and the effect the proposed regulations may have on such methods. For example, some retirement plan service providers receiving shareholder services fees and similar compensation from mutual fund advisors or their affiliates may have negotiated with plan sponsors to rebate back to the plan a portion of those payments. The rebate may then be used to pay various administrative expenses of the plan, or it may be credited back to that particular investment option, enhancing the return of the fund somewhat, albeit in a relatively minor manner. If a portion of the revenue share is rebated back to the plan, that portion increases the fund's return slightly. The proposed regulations could be interpreted to mean that a service provider (assuming fiduciaries would be relying on their service providers for this information) using such arrangements would have to calculate rates of return plan by plan for every plan which has such an arrangement, which could be extremely time consuming and costly. Such costs would often be passed on to the participants, and could consume more than the additional return generated. The result would also differ from what the mutual fund or other investment option calculated at the fund level, which could lead to numerous participant inquiries over minor differences. Therefore, the Department should consider allowing fiduciaries to report performance numbers in a fashion where such minor differences would not have to be separately calculated plan by plan, especially since many fiduciaries will not have the experience required to meet the intricate performance reporting requirements under the 40s Act.

Another issue with such arrangements is that the regulation is not clear as to how expenses paid from them would be noted. Since such amounts are already considered when reporting the annual operating expenses for the particular fund, showing the expenses again would amount to double counting. However, it would be helpful for the Department to note that administrative expenses that are paid as part of the operating expenses of the investment option(s) do not have to be shown again.

Fiduciaries would also benefit if the Department clarified the reporting of "wrap fees" under the regulation. Many recordkeepers receive shareholder servicing fees and other similar fees for services provided to mutual fund (and similar) investment options. Some mutual funds and other investment options do not pay such fees however, and recordkeepers may charge a wrap fee (e.g., 25 basis points) on those investment options to be adequately compensated for their services (as agreed to by the plan sponsor). Most recordkeepers treat such fees as administrative expenses since they are separate from the expense ratio (or similar amount) of the investment option. If wrap fees had to be included in a fund's total operating expense, additional costs would be incurred by fiduciaries having to calculate another version of an investment option's total operating expenses under the 40s Act – something many are ill-equipped to do. Participants could also be confused if such amounts were noted as part of an investment option's total operating expenses, as it would differ from the fund's prospectus or similar document. Therefore, the Department should give fiduciaries discretion as to how they wish to report such wrap fees – either as an administrative expense or as part of the fund's operating expense.

Thank you for the opportunity to comment on the proposed regulations. Please contact me if you have any questions regarding the points raised in this letter.

Sincerely,

Brad J. Schlichting

Bradley J. Schlichting
Senior Counsel