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VIA ELECTRONIC FILING

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

Attn: Participant Fee Disclosure Project

Dear Madam or Sir:

Barclays Global Investors ("BGI") is pleased to offer its comments regarding the rules proposed by the Department of Labor (the "Department") on fiduciary requirements for disclosure in participant directed individual account plans (the "Proposed Rule").

BGI is one of the world's largest institutional investment managers, and the world's largest provider of structured investment strategies such as indexing, tactical asset allocation and quantitative active strategies. BGI created the first index strategy in 1971 and the first target date/lifecycle fund in 1993, just two of the financial innovations BGI has pioneered. At June 30, 2008, BGI managed over US$1.9 trillion with approximately US$225 billion for US defined contribution plans. Headquartered in San Francisco, BGI is a subsidiary of Barclays Bank PLC, one of the world's leading diversified financial services companies. BGI's two regulated US-based asset management companies are Barclays Global Investors, N.A., a national bank supervised by the Office of the Comptroller of the Currency that exercises limited trust powers, and Barclays Global Fund Advisors, an investment adviser registered with the Securities and Exchange Commission (the "SEC") that advises mutual funds and exchange traded funds.

From its founding, BGI has focused on providing low cost investment solutions for its clients. Although we offer some of our investment strategies for participant directed plans through a mutual fund (an open ended registered investment company, or "RIC") investment vehicle, the overwhelming majority of our defined contribution ("DC") plan sponsor clients prefer investment vehicles that are bank collective funds (also referred to as collective trust funds or collective investment funds or "CIFs").

Our DC clients choose CIFs for a number of reasons. Participation in CIFs is limited to U.S. corporate and public pension plans and these funds are established and maintained under a regulatory and tax regime that is designed specifically for pension assets. As explained more fully below, under this regulatory and tax regime, plan sponsors are able to use CIFs in various ways in structuring designated investment alternatives under the DC plans, such as creating customized investment solutions tailored specifically to their needs and negotiating more favorable investment fees on account of plan size or other considerations. As discussed below, CIFs offer plans increased flexibility and low costs, while providing a regulatory regime that protects the interest of the plan and plan participants and beneficiaries.

We note that DC plan sponsors are increasingly choosing bank collective funds—as has recently been reported, a Greenwich Associates study found that 39% of large defined contribution plans used CIFs in 2007, up from 33% in 2005[1]. Yet for the most part the Proposed Rule seeks to adopt as its participant disclosure standard a regulatory regime designed by another agency for individual retail investors for a product that increasingly is not offered as an investment option in participant directed plans. BGI's comments will focus on the weaknesses of, and potential for confusion for plan participants, created by this approach, as well as the failure of the proposal to meaningfully address the critical role of the plan sponsor or other independent plan fiduciary in selecting and monitoring investment options under the plan.

Introduction

Overview

We are pleased that the Department, Congress and others are focused on fees and expenses borne by plan participants in DC plans. The fees and expenses incurred in any investment option can, over time, significantly erode the amount of income ultimately available for a participant's retirement. BGI believes, however, that the Proposed Rule, together with the pending regulatory initiative under Section 408(b)(2) on reasonable contracts or arrangements, could be significantly improved by more directly addressing the two largest issues for DC plans: first, the need for *plan participants* to have ready access to appropriate, easily understood information about critical issues that affect their investment decisions and second, for *plan sponsors* to have sufficient information about fees and expenses to appropriately discharge their responsibilities in the selection of service providers.

We believe it is particularly important for the Department to address the unique fiduciary considerations that a plan sponsor encounters in establishing designated investment alternatives under a participant directed DC plan and in choosing investment funds for the plans. Due to the importance and significant cost of providing plan participant level administration and recordkeeping, a plan sponsor must determine how best to provide and pay for these services. Recordkeeping expense is often – but need not be – funded on a "bundled" basis through the expenses charged against assets held by the investment funds in which the plan invests and/or through fees received by the investment manager. In addition, it is more often the case that plan participants fund all the major costs of the plan (administration, recordkeeping and investment management). Plan sponsors are thus often in the position of agreeing to the fees and expenses that their participants will fund through direct or indirect deductions from their investment balances in the plan. As a consequence of this potential conflict, we believe that it is important

[1] Wall Street Journal, page D-1 (July 24, 2008).

for the Department to address the unique fiduciary issues of participant directed DC plans and to ensure that the Department's regulatory approach does not unnecessarily increase costs paid by plan participants.

The regulatory regime for CIFs rests on fundamentally different premises than those underlying the federal securities laws. In general, the federal securities laws seek to protect investors by imposing strictly delineated registration and disclosure requirements on public issuers of securities and registered investment companies. The key assumption underlying the securities laws is that unsophisticated investors must obtain complete disclosure in order to make an informed decision about a possible investment, and are in a position to make choices among a range of investment options. In contrast, the approach of regulations applicable to CIFs rests on the critical role played by plan fiduciaries interposed between plan participants and their investment choices. In the context of participant directed DC plans, this recognizes that participant investment directions involve two different levels of investment decisions – first, the decision by the plan sponsor regarding the limited investment choices to make available to plan participants from among a wide array of potential investments, and second, the decision by plan participants regarding how to direct their funds among the limited options made available by the plan sponsor. Accordingly, detailed disclosures regarding investment options in general are made directly to the plan sponsor and/or other plan fiduciaries that undertake the important fiduciary obligation of making the initial pre-selection of investment options to be made available to plan participants. Such fiduciaries are themselves subject to extensive regulation.[2] The Proposed Rules reliance on a disclosure regime designed for another purpose ignores the comprehensiveness of ERISA-- the very statute the Department is charged with administering.

<u>Collective Investment Funds for Employee Benefit Plans</u>

In order to fully understand BGI's specific concerns about the Proposed Rule, it is necessary to provide some context as to the regulation of CIFs and the purposes they serve for defined contribution plans. CIFs are managed and maintained by banks with trust powers (some may be limited purpose trust banks) that are overseen by Federal or State banking regulators. The CIFs, which are organized as trusts, are subject to Federal banking and trust regulations (in the case of federally-chartered institutions) and State trust laws (in the case of state chartered institutions and for federally-chartered institutions for certain matters not addressed by Federal regulations).[3] These banking regulations, like much of trust law in general, govern the establishment of the trust, its operations and administration, the responsibility of the trustee to the trusts' beneficiaries

[2] See, ERISA Sections 404 and 406 and generally Title I. No equivalent fiduciary duty is owed to investors under the securities laws. And we note that the mutual fund industry has questioned whether the Department's proposed regulations under Section 408(b)(2) can require investment advisors to mutual funds to make disclosures to plan fiduciaries as contemplated under the proposal—even though these investment managers receive the major portion of plan fees if the plan fiduciary chooses mutual funds as the designated investment alternative. See, Testimony of Paul Schott Stevens, President and CEO, Investment Company Institute, Department of Labor Hearing on 408(b)(2) Proposal (April 1, 2008); Statement of Barbara Fallon-Walsh, Principal, The Vanguard Group before the Department of Labor (April 1, 2008).

[3] See 12 CFR Part 9 of the Regulations of the Office of the Comptroller of the Currency.

(participating accounts), and conflicts of interest. As part of periodic examinations of institutions under their jurisdiction, Federal and state bank regulators will review the trust activities for compliance with its rules and regulations.

In addition to the fiduciary requirements of banking laws, CIFs and their trustees are governed by ERISA because plan assets include both the plan's interest in the CIF and an undivided interest in the assets of the CIF. The trustees of the CIFs are fiduciaries governed by ERISA because they have discretionary authority or control over the CIF and thereby over the management of the plan assets[4]. ERISA imposes strict responsibilities and limitations on banks as fiduciaries with respect to plans whose assets are invested in CIFs.

Because Congress recognized that CIFs are regulated by the Department and banking regulators, CIFs are exempt from regulation by the SEC as investment companies under Section 3(c)(11) of the Investment Company Act of 1940 (the "1940 Act"), and interests in CIFs are "exempt securities" under Section 3(a)(2) of the Securities Act of 1933 (the "1933 Act"). However, the anti-fraud provisions of the Securities Exchange Act of 1934 continue to apply.

Under the US Internal Revenue Code of 1986 (the "Code"), participation in a CIF is restricted to US plans qualified under Section 401(a) of the Code and governmental plans within the meaning of Section 818(a) (6) of the Code. The provisions of the Code work together with the tax provisions that govern the establishment and participation in such plans.[5] Mutual funds, as RICs, are subject to a different part of the Code, Subchapter M, which includes a prohibition on 'preferential dividends". Under preferential dividend rules, mutual funds must charge all shareholders the same investment management fee but may charge different amounts for permissible administrative services that may be bundled with the investment management fee. This gives rise to the establishment of different 'classes" within a mutual fund, which charge different amounts based on the level of administrative and shareholder services bundled with the investment management fee for different groups of shareholders. A CIF, however, may apply differential pricing for plans that are commingled in the same CIF, based upon negotiation of an appropriate fee for the level of service provided with each plan sponsor that elects to invest in the CIF. In addition, the CIF trustee may directly charge a plan or plan sponsor for services provided to the CIF, rather than deducting its fees periodically from the CIF's assets like a mutual fund[6].

Unlike mutual funds, where the shareholder is the investor (and the disclosure regime assumes their lack of sophistication), the CIF investor is the plan, with whom the CIF trustee maintains a fiduciary relationship. The plan sponsor is both an institutional client of the bank and a co-

[4] 29 CFR Section 2510.3-101(h) and ERISA Section 3(21)(A)
[5] To be considered exempt from federal income tax, CIFs must comply with IRS Revenue Ruling 81-100. Briefly, Rev. Rul. 81-100 requires that the trust must be adopted as part of each participating qualified plan; expressly limit participation to 401(a) qualified plans and, through Code section 401(a)(24), governmental plans; ensure that all assets are to the exclusive benefit of beneficiaries; prohibit assignment; and must be a domestic trust.
[6] See OCC Interpretive Letter No. 829 (April 9, 1998). See also 12 CFR Section 9.18(b)(9)(i) and (ii).

fiduciary under ERISA who plays a critical role in evaluating service providers, selecting and monitoring investment options under the plan, and ensuring adequate information is provided to plan participants.

Proposed Rule

Plan-Related Information

The Proposed Rule creates two categories of information which must be provided or made available to participants and beneficiaries in participant directed plans, which it calls "plan-related" and "investment-related"[7]. Plan-related information falls into three categories—general plan information, administrative expense information and individual expense information.

Paragraph 404a-5(c)(2)(i) of the Proposed Rule provides that participants must be furnished an explanation of any fees and expenses for plan administrative services (e.g., legal, accounting, recordkeeping) that, to the extent not included in investment-related fees and expenses, may be charged against the individual accounts of participants, and the basis on which such charges will be allocated to, or affect the balance of, each individual account (e.g., pro rata, per capita).

We support the Department's view that it is not particularly useful for participants to have administrative charges broken out and listed on a service by service basis.[8]

We believe, however, that it is a mistake to allow any and all expenses that are included in investment-related fees and expenses but that are effectively administrative in nature not to be separately categorized or disclosable as an administrative expense. Taken to its logical conclusion, the Proposed Rule would permit the plan fiduciary not to disclose any administrative expenses as such (regardless of size or import) that are calculated as a percentage of the assets in the participant account if deducted from the return of an investment option. And importantly, the second largest expense in participant directed plans is administration and recordkeeping[9].

In addition to creating an incentive to charge administrative costs on an asset based basis, the result will also cause the disclosed "investment-related expense" of a particular investment

[7] As the Proposed Rule is premised on ERISA Section 404(a)(1)(A) and (B), the obligation to provide this information is imposed on the plan fiduciary (i.e., plan sponsor, trustee or administrator), but as a practical matter, most of the required disclosures and documents will likely be produced and maintained by plan service providers (e.g.,recordkeepers, investment managers), at potentially significant costs—which will ultimately be borne, directly or indirectly, by plan participants. The "Regulatory Impact Analysis" of the Proposed Rule either fails to address or woefully underestimates these costs because it focuses principally on the efforts of the plan fiduciary, and further assumes the current existence of documentation for all investment options as if all investment options are subject to the same disclosure requirements imposed on mutual funds under federal securities laws.

[8] The plan fiduciary presumably has received the detailed information on these administrative services and their related fees as may be necessary for it to make its determination that the contract or arrangement is "fair and reasonable" under ERISA Section 408(b)(2).

[9] GAO Report 07-21: Changes Needed to Provide 401(k) Participants and the Department of Labor Better Information on Fees (November 2006).

option to be overstated. This approach also apparently contradicts the statement in the preamble that "statements should be sufficiently specific to…enable [participants and beneficiaries] to distinguish the administrative services from other charges and expenses that may be assessed against their accounts".

By combining all asset-based charges, regardless of source, the Department adopts a misguided view that for plan participants the allocation between administration expenses and investment management fees that are charged against a particular investment option is somehow less important than the totality of the charges that affect the return of the option[10]. In making a decision about an investment option, the plan participant should know whether he/she is paying for 'manager performance' (for example, an active manager who seeks to outperform a benchmark) or whether the difference in the expenses charged against his/her return in a particular investment is due to other fees, such as administrative, recordkeeping or shareholder servicing costs that are bundled with the investment management fee under the mutual fund share class system. Only this way can a plan participant evaluate whether the investment management cost is worth the value the manager has the potential to return for the participant.[11] The Proposed Rule does not permit plan participants to make this comparison because it blurs the distinction between manager costs and other expenses that are bundled with investment management fees.

We do not understand the Proposed Rule to limit the ability of an employer who pays all or part of the administrative costs of the plan to so advise plan participants and beneficiaries, thus alerting them to this potentially significant benefit. It would be helpful for the Department to confirm this when the final rule is enacted.

Investment-related Information

The Proposed Rule sets forth investment-related information that must automatically be furnished to plan participants, including a model format for such information, and additionally the information that must be furnished upon request. For the most part, the Department has assumed that the disclosure regime established under the federal securities laws for mutual funds provides the information that is appropriate for plan participants, ignoring both the special circumstances inherent in participant directed plans subject to ERISA and the existence of many investment options that are not subject to such disclosure regimes.[12]

[10] The same error is made in the Department's proposal concerning the obligations of plan fiduciaries to determine whether the contract or arrangement for such administrative services is "fair and reasonable" by permitting service providers to only disclose an aggregated charge for services (administrative/recordkeeping and investment management) if the services are 'bundled".

[11] If asset-based administrative/recordkeeping costs were identical among all options in a particular plan, separate disclosure of this information would be less relevant. But as the Department knows, this is not the case for most plans that use 'bundled' or 'semi-bundled' service providers.

[12] The Department indicates in the proposal that it consulted with the US Securities and Exchange Commission but does not indicate that it sought information from banking regulators (e.g., the Office of the Comptroller of the Currency) regarding the regulatory regime for CIFs. We think such a consultation would improve the Proposed Rule and we respectfully suggest the Department conduct such consultation prior to further action on the proposal.

We support the Department's efforts in the Proposed Rule to provide plan participants information on a plan's designated investment alternatives and their fees and expenses in a format that will facilitate comparison across the alternatives.

We have a number of suggestions for changes and improvements to this format, discussed below. These changes are so fundamental to this core document that we believe the Department should revise the comparative chart and re-propose the Proposed Rule and its Appendix for further public comment.

BGI believes that participants need information communicated in a way that is easy to understand and facilitates comparison across the full range of designated investment alternatives, including automated asset allocation funds (i.e., target date funds and managed accounts) as contemplated in the Department's Qualified Default Investment Alternative regulation. Funds should be organized around risk level, rather than by asset class, as participants do not necessarily understand asset class designations, but do understand risk levels such as conservative, moderate, moderate aggressive and aggressive. There should be a separate section called "premixed asset allocation products" for multi-asset class investments and indicate that the risk level is either static or a function of the investment horizon. This approach provides two benefits: it provides basic risk information without the necessity for a plan participant to review another document and eliminates the category of "other" which otherwise would include all designated investment alternatives that are not stock or bond funds.

A fund description should be provided that communicates the investment objective succinctly and in 'plain English". We don't believe the mere identification of the management style of a fund as being "passive" or "active" provides useful information to most participants, who would not be familiar with this investment terminology[13]. Instead, this information should be in the investment objective statement. For example, an investment objective for an S&P 500 fund might read "this fund is designed to provide broad exposure to U.S. equities with a focus on the largest 500 companies as valued by the market. This fund is a passive fund because the objective is to provide performance that very closely approximates the returns of the stocks in the S&P 500 index".

The performance should be calculated under definitions established by the Department itself (not under SEC definitions as explained further below) and should cover one, three and five years. [14]

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[13] Unless asset based fees for administration/recordkeeping are disaggregated from management fees, the distinction between passive and active is not very meaningful—participants need to understand how much excess return ("alpha") they should be expecting vis-à-vis the fees to be paid. If certain designated investment options carry more administrative/recordkeeping expenses than others (which is not uncommon), plan participants need to know that higher fees are not necessarily due to high excess return expectations.

[14] We agree with the Department's approach that if a designated investment alternative has not been in existence for the entire period (the full number of years), the appropriate notation should be "not available" (with a general

The benchmark (and there should only be one per investment option) needs to be explicitly identified and the return against the benchmark should be given as opposed to only absolute benchmark performance. Simply stated, the chart should "do the math" for the plan participant or provide the performance information in a line chart or other graphical format that makes relative performance easily understood. Last, as noted below, the fund specific website reference should be eliminated, and replaced with a reference to the website maintained by the plan fiduciary or its agent, where participants and beneficiaries can easily locate additional information that is relevant and appropriate.

BGI supports the Proposed Rule's creation of a 'safe harbor' for plan fiduciaries that use the model format, as this should encourage uniformity of disclosure, easing the burden on service providers who have multiple clients requiring inputs into the comparative chart. It may also increase the familiarity with this important information by plan participants who change jobs, as it will change less from employer to employer.

We take issue, however, with the Department's approach to the provision of the required supplemental investment related information, as well as the information that must be furnished upon the request of the plan participant.

The Proposed Rule provides that along with the comparative information about the investment options under the plan, that the plan participant be provided "...an Internet Web site address [leading to] information regarding the investment alternative, including its principal strategies, risks, performance and costs... for example, a [SEC] required prospectus (or other document) made available at a Web site address". We believe the Department's acceptance of a document prepared for another purpose—the offer and sale of shares in a mutual fund to retail investors—may in fact provide information for the participant that has the potential to be confusing, or even misleading, in a DC plan context.

We are also concerned that the incorporation of the use of a "similar document"[15] to a prospectus for those investment options not subject to the registration requirements of the federal securities laws as applied to mutual funds will force providers of these investment options to satisfy this requirement for the plan fiduciary by creating a more detailed form of disclosure document than is generally in use, containing information not applicable or relevant to its products nor necessary for plan participants. This not only ignores the regime under which bank and insurance products are regulated, but it will increase the costs of providing these products which will be passed to plan participants.

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explanation of what this means for all such investment alternatives). If performance were permitted to be shown "from inception" the chart loses much of the advantages of ease of comparability.

[15] This appears contemplated in both the required 'supplemental information' under Paragraph (d)(1) and the information to be provided "upon request" under Paragraph (d)(4) of the Proposed Rule.

To elaborate on the first point, the SEC-mandated prospectus for mutual funds is a disclosure document for the purposes of providing information to retail investors who are making decisions on potential investments in a wide range that includes individual equity securities, certificates of deposit, bonds, mutual funds, etc. . This decision-making context is different from one where a plan fiduciary has made determinations in its fiduciary role that greatly narrow the investment choices.

In addition, the disclosures provided in mutual fund prospectuses are based on certain structural differences and assumptions that do not apply to CIFs. For example, in the average annual total return chart, share class-level expenses must be applied but sales loads, account fees and transaction/redemption fees are not.[16] A typical investor's return, particularly if the investor is charged a sales load or a redemption fee, would be different from the mutual fund's returns depicted in the prospectus. In addition, mutual fund disclosure regarding waivers of service provider fees varies based on the service provider as well as the type and terms of the waiver (contractual, voluntary, multi-year, etc.). Information about such waivers might be disclosed in fee table footnotes or in the "fine print" of a mutual fund's offering documents (typically, the Statement of Additional Information, a document provided to investors only upon their request). Moreover, the waivers might not be reflected in the expense or total return information presented in the prospectus, which reflects generic information for shareholders generally rather than the actual costs incurred by participants in a particular plan. Such assumptions—that are built into the definition that the Department seeks to adopt through its incorporation of SEC rules—could result in information that for a plan participant is inaccurate and misleading.

In addition, we note that mutual fund prospectuses disclose the total expenses deducted from each share class – including expenses for bundled recordkeeping, administration or shareholder servicing costs – but do not disclose the amount of such expenses that are actually used to benefit participants in a particular plan. The tax requirements applicable to mutual funds require mutual funds to charge a single rate for similar services provided to shareholders of a class of shares. However, in many cases, a mutual fund's administrator (or similar service provider) may agree to pay a plan recordkeeper or plan administrator a lower amount for shareholder services than the stated amount charged against the share class in which a plan is invested (in which case the fund's administrator or similar service provider would generally keep any difference). We believe that DC plans should have the opportunity to know if their participants are being charged more for shareholder services than the recordkeeper or administrator is actually receiving to provide shareholder services to the plan's participants.

We note also that the Proposed Rule relies on the SEC mutual fund prospectus and summary prospectus, yet the SEC has recently re-opened this rulemaking for additional comments.[17] This puts the Proposed Rule references to this document as acceptable disclosure in an unusual position—supporting that ready access to the summary prospectus may discharge the disclosure

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[16] See US Securities and Exchange Commission Form N-1A ("Form N-1A"), Item 2, Instruction 1(a).
[17] SEC Release Nos. 33-8949; IC-28346 (73 Fed. Reg. 45646, August 6, 2008).

obligation of a plan fiduciary to provide adequate disclosure to plan participants without the Department knowing exactly what the content of the summary prospectus will be.

While we understand the desire not to overload the plan participant with information that he/she will not read, using a fund website as a source for additional information is not going to provide fully accurate information for the plan participant. Although the public website of a mutual fund provides information on particular funds, including costs and expenses, it does not provide cost and performance information on a fund as an investment option as made available to a plan participant in a particular plan.[18] We also question the efficacy of sending a plan participant to a website that most certainly will contain information, including prospectuses, for funds that are not investment options under his/her plan.

In a number of cases plans provide for generic investment options which may invest in more than one pooled fund selected by the sponsor for that option (e.g., a balanced option that invests in one or more fixed income and equity investment vehicles or a lifecycle option allocating among investment vehicles).[19] The return on these types of investment options will necessarily reflect a blending of the returns on the underlying investment vehicles. However, directing a participant to the prospectus/disclosure documents for each of the underlying investment vehicles could be misleading since the returns and fees disclosed in such documents for such vehicles would not represent the returns/fees associated with the blended investment option.

As stated previously, using documents created under another regulatory regime for a different purpose ignores the significant differences between the federal securities laws and ERISA. The plan sponsor pre-selects the investment options available under the plan, and as a fiduciary has certain responsibilities in this regard.[20] It also ignores the regulatory regime that Congress put into place (and reconsidered on several occasions) for CIFs in employee benefit schemes, where it was determined that the protections provided to retail investors by the federal securities laws were not necessary given the protections provided by trust and banking laws[21], and then the second fiduciary layer provided by ERISA.

The challenge of providing easily accessible and relevant information for plan participants and beneficiaries could be solved by plan fiduciaries (or their agent adminstrators/recordkeepers)

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[18] The calculation does not reflect the return of the designated investment alternative as it is available in a particular plan, as it may include some expenses not actually paid by the plan (or anyone else, in the example of a voluntary fee waiver).

[19] The Department's QDIA regulation specifically contemplates this where it permits the plan sponsor who is a named fiduciary within the meaning of 402(a)(2) of ERISA to act as the manager for the QDIA. 29 CFR 22550.404c-5(e)(3)(i)(C).

[20] As the Proposed Rule states: " Nothing herein is intended to relieve a fiduciary from its duty to prudently select and monitor providers of services to the plan or designated investment alternatives offered under the plan."

[21] This approach is consistent with the federal securities laws which provide exemptions from registration and disclosure requirements (although not from anti-fraud provisions) where the offer and sale is targeted to institutional investors or "sophisticated" individual investors. See, e.g., Regulation D under the 1933 Act and Section 3(c)(7) of the 1940 Act.

providing access to supplemental information through a website maintained specifically for a particular plan's participants. A comparative chart could provide "click-through" capabilities to additional information about the investment options, containing similar content as suggested in the Proposed Rule, with information that accurately reflects the fund as available to the participant, and excludes information that is extraneous.[22] We believe this approach will be supported by plan sponsors who increasingly want their employees to be able to access information about benefits from a central source under the control of the employer. We suggest the Department delete reference to SEC mandated prospectuses, and substitute its own rules as to the content of supplemental disclosures (which should take into account the current regulatory regime and general disclosure practices applicable to CIFs). [23] It may be appropriate in this regard for the agency to convene a panel of industry experts to agree on supplemental disclosures that will best achieve the goal of assisting participants to more effectively manage their retirement savings.

Miscellaneous
Set out below are comments on a number of other issues that are raised by the Proposed Rule.

Timing of Disclosures. The Proposed Rule provides that certain disclosures be provided "on or before" the date a participant becomes eligible for participation in a plan. This needs to be modified for those plans where eligibility begins on the first day of employment.

In regard to "material changes", the Proposed Rule provides that participants are to receive the required information not less than 30 days after adoption. The practical reality is that a plan fiduciary may decide, i.e., "to adopt" a change in investment options or recordkeepers, but implement those changes six to twelve months later. The final rule should clarify that material changes are to be notified to participants 30 days in advance of the effective date or date of implementation, not the 'date of adoption".

List of Assets. The Proposed Rule provides that, upon request, a plan participant is to be provided with a list of assets (and the values thereof) comprising the portfolio of each designated investment alternative which constitute plan assets, as defined under ERISA. This proposal could be improved in a number of respects. The proposal does not specify whether this list need be prepared "on request" or whether a list prepared periodically (semi-annually, annually) will suffice. The reference to 'plan assets' means that for investment options that are mutual funds, the participant will receive the name of the fund and its value (or perhaps several funds and their values if used in a balanced or lifecycle strategy), but for those pooled vehicles that are plan

[22] This is done today as so-called "fund fact sheets" for both investment options that are registered under the 1940 Act as well as those not required to be registered.
[23] Even the SEC concedes the point that CIFs that are regulated under ERISA and rules of the Comptroller of the Currency are sufficiently regulated to be excluded form the mutual fund registration and disclosure requirements of the federal securities laws. See Protecting Investors: A Half Century of Investment Company Regulation, Division of Investment Management, US Securities and Exchange Commission, pp. 178-179. The SEC also drew the same conclusion for insurance company separate accounts regulated under ERISA.

assets, such as CIFs, the participant will receive a list of assets with each asset separately valued. We question the usefulness of this information to plan participants[24] but if the decision is made to retain this requirement, it needs to be modified to provide that the plan fiduciary is to provide upon request the most recent publicly available list of assets and values in any pooled vehicle whether or not they constitute "plan assets", and that this list need only be updated semi-annually.

Definitions. The Proposed Rule incorporates by reference the definitions of "average annual total return" and "total annual operating expense" as promulgated by the SEC for use by open end mutual funds.

In addition to the concerns about these definitions raised elsewhere in this letter, if these definitions are retained in the final rule by reference to the SEC rules and by specific number, the rule should specify whether the definition used is to be that which was in place as of the effective date of the final rule, or whether the definition will change if the SEC rule and instructions changes[25].

Regulatory Impact Analysis. The regulatory impact analysis begins with a flawed assumption that results in a significant understatement of the costs of compliance, which is that plans that have chosen to comply with Section 404 (c) and regulations thereunder are already providing the information or "similar information" required by the Proposed Rule. A careful reading of the 404(c) regulations shows that the plan fiduciary is required to provide prospectuses and other information that it receives from the service provider, but not to have the service provider itself prepare or maintain materials especially for that purpose.[26] The analysis also assumes that "in most cases" more detailed information on investment options is now 'readily available" to plan participants through internet websites. For investment options not subject to registration under the federal securities laws, this is simply not the case.[27] As a result, the analysis ignores the cost to develop and prepare a "prospectus or similar document" for those investment options not subject to such requirements under the federal securities laws. If enacted as proposed, this will create significant new costs that will ultimately be borne by plan participants.

[24] There may be value to this information to a plan fiduciary in exercising its duty to monitor the designated investment alternatives.
[25] We again question why the Department would use the definitions of another agency developed for another purpose rather than develop its own definitions that would more effectively assist plan fiduciaries and their plan participants and beneficiaries in making meaningful comparisons among investment alternatives.
[26] Contrast 29 CFR 2250.404c1(b)(2)(i)(B)(1)(viii), which provides that in the case of an investment alternative which is subject to the 1933 Act, the plan fiduciary must provide a copy of the most recent prospectus (and is silent as to investment alternatives not subject to the 1933 Act), with 29 CFR 2250.404c1(b)(2)(i)(B)(2)(ii), which provides that the plan fiduciary must provide copies of any prospectuses, financial statements and reports, and any other materials relating to the investment alternatives, "to the extent such information is provided to the plan".
[27] Plan sponsors or their agents may provide information on these types of options on websites accessible solely to plan participants in a particular plan, or some providers may post some information on publicly available websites, but since the detailed requirements of mutual fund prospectuses and Form N-1A are not applicable (for reasons discussed elsewhere in this letter), the information is not necessarily "similar" as assumed by the analysis.

We also question whether the development of the comparative format is a 'clerical' exercise, although we believe that if an industry consensus on content is agreed, populating the chart and its maintenance by a plan fiduciary should not be overly burdensome.

While we agree that there is a need for regulatory action and for the same reason as the Department—how well plan participants are prepared for retirement is determined by how well they invest their retirement savings, and a key determinant of the return on investment are fees and expenses. However, we find the Department's discussion on why the market does not already provide necessary disclosures to have a misplaced focus. The discussion assumes that the demand for disclosure is consumer driven and transparency is undervalued by employees. The analysis fails to address, however, the effect of the separation of the entity selecting the services/service provider from the individuals that are paying the costs of the services. It is this "market failure", we propose, that lies at the root of the lack of transparency in fee setting and disclosure. We agree that a plan participant can lower his/her costs of investing by choosing the lower cost options in a plan, but can only do so from <u>among</u> the options selected by the plan fiduciary (and subject to the administrative/recordkeeping fees agreed by the plan fiduciary). Until the Department (or Congress) mandates meaningful disclosures to plan fiduciaries on administrative/recordkeeping expenses separately from investment expenses (even if the services are acquired on a bundled basis), there will not be the necessary transparency for the plan fiduciary to select the most appropriate investment options for a plan.

Effective Date. Echoing the many comments made on this aspect, it is not realistic to have an effective date for this rule of January 1, 2009. We believe that the requirements of the rule should not be effective until at least 18 months after the promulgation of a final rule.

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We appreciate the efforts of the Department to assure that plan participants receive the appropriate disclosures that will assist them in making sound investment decisions about their retirement assets. At the same time, given the role of the plan sponsor in the selection of investment options and service providers, it is important that the Department consider the interdependency of the Proposed Rule with its pending regulatory initiative regarding reasonable contracts or arrangements under Section 408(b)(2) of ERISA. As a result, we respectfully suggest that the Department conduct a public hearing on the Proposed Rule, and explicitly re-open the comment period on the Section 408(b)(2) regulations. The Department has repeatedly made clear that these two rules, together with the Form 5500, are the foundation for achieving the important goal of adequate and appropriate disclosure for plan fiduciaries and plan participants and beneficiaries. Given this interdependency we believe both rules should be substantially revised and re-proposed for further comment after a public hearing. The importance of getting this right cannot be overstated--the retirement savings of millions of Americans are substantially impacted by these rules.

BGI welcomes the opportunity to further discuss its views on this important topic with the Employee Benefits Security Administration staff and others in the Department.

Sincerely,

Kristi Mitchem
Head of US Defined Contribution