



August 30, 2010

Filed via e-ORI@dol.gov

Robert J. Doyle, Director
Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5655
U.S. Department of Labor
Washington, D.C. 20210

Attention: 408(b)(2) Interim Final Rule

Dear Mr. Doyle:

AARP commends the Department of Labor for issuing this interim final regulation on fee disclosure to plan fiduciaries and for its leadership on this issue over the past decade. AARP believes that this interim regulation is a good first step towards providing comprehensive information to plan fiduciaries so that they will be able to fulfill their fiduciary duties of due diligence to ensure that plan fees are reasonable.

I. BACKGROUND

As more employers adopt defined contribution plans as their primary retirement vehicle, AARP and its members have a substantial interest in ensuring that as many employees as possible participate in employer-sponsored plans, that employers and participants make adequate contributions, and that those employees who participate in their employers' defined contribution plans have

the information they need to maximize the returns on their contributions, consistent with their risk tolerance.¹

A primary consideration in achieving the goal that employees maximize the returns on their contributions is to invest in those options with low fees and expenses. See, e.g., <http://www.aarpfinancial.com/content/resource/investing/lowfees.cfm>. We know that fees matter. A one percentage point fee differential on a participant's 401(k) account has a dramatic impact – resulting in an over 17 percent reduction in the account balance over the 20-year period. *Changes Needed to Provide 401(k) Plan Participants and the Department of Labor Better Information*, GAO-07-21 (November 2006). Thus, in order for participants to maximize their returns, plan fiduciaries -- in selecting investment options -- must consider fees and expenses. Accordingly, clear, comprehensive, and easily accessible information is essential for fiduciaries to make informed decisions concerning the reasonableness of plan fees in comparison to the services provided and the rates of investment return.

II. SUMMARY DISCLOSURE

We understand that the Department of Labor is considering requiring a summary disclosure from each provider concerning the fees charged for each of their products or family of products, as well as information regarding how and where to find more detailed information about them. AARP strongly supports such a summary, and believes it is particularly crucial for plan fiduciaries with small and medium size plans which may not have the market clout to procure such information outright, or the resources to analyze or to engage consultants to analyze, often scattered and disparate information. See, e.g., Doug Halonen, *DOL's fee disclosure rule likely to aid investment consultants*, PENSION & INVESTMENTS (July 26, 2010), available at www.pionline.com/article/20100726/PRINTDSUB/307269979 (suggesting compliance will be easier with the use of consultants).

Under the interim regulation, the fee information the responsible fiduciary will receive about the potential plan and investment options is often scattered among several sources, difficult to access, or nonexistent. Even if fee information is accessible, plan investment and fee information is not always presented in a way that is meaningful to fiduciaries.

¹ The enactment of the automatic enrollment provisions of the Pension Protection Act has greatly increased participation and contribution rates in defined contribution plans. See *Auto-Enrollment Helping to Reduce Those "At Risk" of Running Short of Money in Retirement* (EBRI No. 175 July 27, 2010).

We submit that the regulation should require that covered service providers furnish the responsible plan fiduciary with a single document of no more than two pages that highlights all direct and indirect compensation and fees. To the extent that unbundling of certain fees are required (see Section III, *supra*), that breakdown should be highlighted on the summary as well. Finally, we suggest that the Department propose one or more model disclosure forms, and believe that the model disclosure form originally drafted by the Department of Labor is a good starting point.

III. UNBUNDLING OF FEES

Although the interim final regulation requires unbundling of recordkeeping fees -- a good start to respond to the most egregious problem with fee disclosures -- AARP submits that unbundling of only recordkeeping fees is inadequate. We submit that three or four broad categories, such as investment fees, recordkeeping fees, other administrative fees and/or trustee/custodial fees, are necessary to ensure that the information provided to the responsible fiduciary is accurate and realistic. By so doing, fiduciaries can see the approximate true cost of each of these broad categories. Of course, the regulation should require that the sum of the categories must equal the total fee charged. Transparency is essential to ensuring that the fiduciary receives accurate information to aid them in making an informed decision.

Under the interim regulation, the provider could state that the total fees for the plan are 50 basis points, and the cost of recordkeeping is 5 basis points. Under this scenario, it would be difficult for the fiduciaries to determine if the cost for recordkeeping makes sense if they do not see the other cost numbers. By requiring that the provider disclose the amount of fees in broad categories, fiduciaries will be better able to determine whether the balance between the different fees are consistent among competing providers. In addition, further unbundling will prevent providers from manipulating the cost figures to present an unrealistically low number for record keeping, claiming that recordkeeping costs are next to nothing.

Requiring that plan service providers give more comprehensive information to fiduciaries will provide the fiduciaries with the resources they need to fulfill their fiduciary duties of due diligence in ensuring that plan fees are reasonable. Fiduciaries doing due diligence need to have access to the costs associated with various components, not just total costs. AARP believes this information is of great importance for plan participants, as costs are often passed directly on to them.

IV. DISCLOSURE OF CONFLICTS OF INTEREST

AARP submits that the final regulation should provide for the disclosure of conflicts of interest as under the proposed regulation. This will enable fiduciaries to understand the relationships and indirect sources of compensation that may create potential conflicts of interest.

V. COMPLIANCE WITH THE REGULATION DOES NOT MEAN A FIDUCIARY HAS MET ALL OF ITS FIDUCIARY DUTIES.

AARP submits that the Department should amend the interim final regulation to explicitly state that compliance with the regulation does not necessarily mean that the fiduciary has complied with its general fiduciary obligations. Plan fiduciaries have an obligation to read, understand, evaluate and make prudent decisions in light of the disclosures they have received; such disclosures must be received so that the plan fiduciaries have adequate time to evaluate the information they are provided. Plan fiduciaries must also provide the participants with fee information so that they can make informed choices. Indeed, plan fiduciaries may have the obligation to request additional disclosures and information if the fiduciaries believe that it would be prudent to do so.² Given recent jurisprudence concerning the Department's interpretation of ERISA section 404(c), see *Hecker v. Deere Co.*, 569 F.3d 708 (7th Cir. 2009), the Department should make its position explicit in the final regulation.

CONCLUSION

Clear, meaningful, easy to understand and easily accessible information about plan investments and fees will help plan fiduciaries fulfill their fiduciary responsibility in order for them to make prudent choices. Fiduciaries are obligated to ensure that fees paid to service providers and other plan expenses are reasonable, and they are required to monitor these expenses. For example, as plan assets grow, a fiduciary has the obligation to revisit whether an initial fee arrangement is still prudent. By providing fiduciaries with unbundled fee information and transparency regarding conflicts of interest, fiduciaries will be

² AARP urges the Department to include a "no inference" clause stating that a court should not infer fees and expenses including revenue sharing are reasonable and/or violative of Section 404(a) of ERISA.

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able to make decisions that better safeguard the plan's retirement income returns and enhance workers' retirement savings.

AARP appreciates having the opportunity to provide its views on the 408(B)(2) Interim Final Rule. If you have any questions, please do not hesitate to contact Thomas Nicholls at 202/434-3760 or Mary Ellen Signorille at 202/434-2072.

Sincerely,

A handwritten signature in black ink, appearing to read "David Certner", with a long horizontal flourish extending to the right.

David Certner
Legislative Counsel and
Director of Legislative Policy
Government Relations and Advocacy