



*Filed Electronically
Via e-ORI@dol.gov*

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

Attn: 2010 Investment Advice Proposed Regulation

**Investment Advice – Participants and Beneficiaries
75 Fed. Reg. 9360 (March 2, 2010)**

Dear Messrs. Doyle and Wong:

AARP appreciates the opportunity to comment on the Department of Labor's (DOL or Department) proposed regulation concerning investment advice provided by fiduciaries to participants¹ in participant-directed individual accounts.

AARP submits that this proposed regulation concerning the core issues surrounding investment advice better reflects the intent of Congress and the carefully crafted compromise between the House and the Senate in the Pension Protection Act. *E.g.*, Recorded Vote 328, 109th Congress,

¹ AARP will use the term participants throughout our comments, but this term includes beneficiaries.

November 16, 2005.² We strongly support the Department's withdrawal of the Class Exemption as it did not provide the necessary substantive protections for, and was not in the best interests of, participants. In contrast, the proposed regulation does a much better job of balancing participant protections with the narrow Congressional exemptions from the fiduciary duty rules.

The proposed regulation still raises some difficult (and new) issues, and AARP believes that the Department's proposed resolution of these matters could be significantly improved.

- Fee Leveling. Although AARP supports the rule that an investment adviser or its firm cannot be compensated directly or indirectly based on the investment choices made by the participant, the prohibition does not go far enough. We submit that this prohibition should be extended to a fiduciary adviser's affiliates.
- Computer modeling. AARP submits that ignoring historical returns will actually have a negative effect on participants' returns inasmuch as historical returns appear to be valid predictors of poor performance. Moreover, the Department seems to be expressing a preference for a particular type of investment strategy which is unprecedented and inconsistent with past DOL positions. There are also potential problems with index funds if the underlying investments are not properly chosen.
- Generally Accepted Investment Theories. The proposed regulation should confirm that a generally accepted investment theory includes diversification of investments in terms of both asset classes and single stocks.
- Exclusion of Investment Options from Computer Models. The proposed regulation permits computer models to exclude advice on employer stock, annuities, and target date and lifestyle funds. First,

² Congressional representatives, who struck the compromise, had informed the Department that provisions in the withdrawn regulation and Class Exemption did not reflect this agreement. See October 6, 2008, Letter to Assistant Secretary Brad Campbell from Sen. Jeff Bingaman, Sen. Edward M. Kennedy and Sen. Charles E. Grassley, and October 8, 2008, Letter to Assistant Secretary Brad Campbell from Rep. George Miller and Rep. Rob Andrews.

in one of the few areas in which economists and investment advisers actually agree – that excessive investment in a single stock is extremely risky because of lack of diversification – the proposed regulation refuses to permit investment advice concerning employer stock and diversification. This is inconsistent with most if not all generally accepted investment theories, and turns a blind eye to vastly increased risk levels for individuals. Second, the fact that annuities, if offered under the plan, are excluded from investment advice seems counter to the Department’s recently expressed concern that individuals may not have sufficient monies to last through their retirement. Third, these exemptions are not consistent with the statutory language that computer models “take into account all investment options under the plan.” Fourth, a competent recommendation on investments cannot be made without the recommendation taking into account all investment options, including assets the participant may already have invested in one or more of the excluded options.

It is unclear from the regulation whether fiduciary advisers who do not use a computer model may discuss these options with participants. The regulation should be clarified that this is not only permissible, but required.

AARP’s Interest

AARP is the largest nonprofit, nonpartisan organization representing the interests of Americans age 50 and older and their families. Nearly half of our members are employed, full or part-time, with many of those employers providing retirement plans. A major priority for AARP is to assist Americans in accumulating and effectively managing adequate retirement assets to supplement Social Security. The shift away from defined pension plans to defined contribution plans has placed significant responsibility on individuals to make appropriate investment choices so that they have adequate income to fund their retirement years.

In order to help individuals make appropriate investment decisions, AARP shares the goal of increasing access to investment advice for individual account plan participants. To that end, we have consistently asserted that such advice must be subject to the Employee Retirement Income Security Act’s (ERISA) fiduciary rules, based on sound investment principles and

protected from conflicts of interest. The recent financial turmoil and scandals underscore the imperative that such advice is independent and non-conflicted, and the standards governing industry practices involved in rendering investment advice are fair, clear and easy to understand.

AARP Survey on Investment Decisions

In a 2008 AARP survey, respondents answered questions concerning what factors they thought were important when making decisions about investments in their 401(k) plans. Collette Thayer, *Comparison of 401(k) Participants' Understanding of Model Fee Disclosure Forms Developed by the Department of Labor and AARP* (Sept. 2008), available at http://www.aarp.org/research/surveys/stats/surveys/public/articles/fee_disclosure.html. Respondents cited the risk of the investments (94%); the reputation of the financial services that managed the investments (93%); the past performance of investments (92%); diversification of investments (92%) and the amount of fees (85%) as important considerations when making investment decisions in their 401(k) plans. *Id.* at 6-7. Significantly, the types of information that respondents thought would be very helpful in making decisions concerned the amount of fees deducted, information about past performance and performance and fee benchmarks. *Id.* at 7-8. Individuals may be unwilling to use and/or trust investment advice that does not take into account the information they believe is important to make decisions concerning investment options.

The Pension Protection Act

The financial industry's protracted campaign to legitimize the furnishing of direct investment advice to 401(k) participants resulted in hearings and extensive debate in Congress and public policy circles, spanning three separate Congresses. See Doug Halonen, *Delay on Advice Rule May Lead to Revamp*, PENSIONS & INVESTMENT (January 26, 2009). Against this background, the Pension Protection Act (PPA) created a narrow exemption from ERISA's prohibited transaction rules to permit plan fiduciaries to structure investment advice arrangements where the advice provider is affiliated with the provider of the underlying investment options. Accordingly, Congress mandated certain restrictions and participant protections as a condition to permitting providers to give conflicted advice to participants.

The statutory exemption to ERISA's prohibited transaction rules permits one of two models. First, a compensation model may meet the exemption if the compensation received by the provider of advice does not vary based on the investment option selected. Second, a computer model may meet the exemption if the model uses generally accepted investment theories and is certified by an independent expert. The PPA offers plan sponsors protection from fiduciary liability only for the advice given under these specific models. The PPA confirms that the plan sponsor has a fiduciary duty to prudently select and monitor the entity providing the advice.

Although the PPA tracked most of the language set forth in the House-passed bill, H.R. 2830, see H.R. 2830, 109th Cong., 1st Sess. (June 9, 2005), 2005 CONG US HR 2830, the Act contains three significant modifications relevant here. One modification was the change in the provisions regarding compensation of fiduciary advisers. Both H.R. 2830 and the PPA state that "compensation received by the fiduciary adviser and affiliates thereof in connection with the sale, acquisition, or holding of the security or other property [must be] reasonable." However, the PPA further limits compensation received specifically by the fiduciary adviser. Discussing criteria for meeting requirements of an "eligible investment advice arrangement," section 408(g)(2) of ERISA states that "fees (including any commission or other compensation) received by the fiduciary adviser for investment advice or with respect to the sale, holding, or acquisition of any security or other property for purposes of investment of plan assets *do not vary* depending on the basis of any investment option selected." 29 U.S.C. § 1108(g)(2) (emphasis added). A second critical distinction between H.R. 2830 and the PPA concerns the timing of the required disclosures. H.R. 2830 called for disclosure, via written notification, to be made to the recipient of the investment advice, "at a time reasonably contemporaneous with the initial provision of the advice." The PPA, however, requires that disclosure by a fiduciary adviser, also via written notification, be provided to a participant or a beneficiary "*before* the initial provision of the investment advice." 29 U.S.C. § 1108(g)(6) (emphasis added). Finally, although H.R. 2830 did not address the issue of investment advice procured using a computer model, the PPA permits the use of computer models to meet the definition of an "eligible investment advice arrangement" as long as the specific requirements are met.

Withdrawal of Class Exemption

AARP fully supports the withdrawal of the published Class Exemption. As we have previously stated in our comments, AARP believed that the Class Exemption did not provide the necessary substantive protections for, and were not in the interests of, participants. See ERISA §§ 408(a)(2) & (3), 29 U.S.C. §§ 1108(a)(2) & (3).

Level Fee Arrangements

The PPA limits compensation received by the fiduciary adviser, which also includes affiliates. Section 408(g)(2) of ERISA, discussing criteria for meeting requirements of an “eligible investment advice arrangement,” provides that “fees (including any commission or other compensation) received by the fiduciary adviser for investment advice or with respect to the sale, holding, or acquisition of any security or other property for purposes of investment of plan assets *do not vary* depending on the basis of any investment option selected.” 29 U.S.C. § 1108(g)(2) (emphasis added).

AARP supports the regulation’s prohibition that an investment adviser or its firm cannot be compensated directly or indirectly based on the investment choices made by the participant. We submit that this prohibition should be extended to a fiduciary adviser’s affiliates. Although we appreciate that the proposed regulation attempts to put some boundaries around this relationship by prohibiting the affiliate from providing any financial or economic incentive to that fiduciary adviser, AARP submits that the potential for conflicts of interest still exists and this could be harmful to participants.

We also support this provision’s application to target date and lifestyle funds which might be constructed with proprietary funds benefitting their firms. This is a continuing problem. See *generally Figas v. Wells Fargo & Co.*, D. Minn., No. 08-4546 (alleging breaches of fiduciary duty when Wells Fargo invested 401(k) plan retirement savings in mutual funds managed by Wells Fargo).

We support the intent that advisers would be prevented from steering participants toward higher-fee investments or financial products from which they or their companies may receive commission income. We do question,

however, how enforcement will be performed, and submit that auditing may not be sufficient. Effective enforcement is particularly important so that participant losses are kept to a minimum, given limited access to the courts, *Conkright v. Frommert*, 2010 U.S. Lexis 3479, as well as limited remedies. *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002).

Computer Model

General

Congress saw the computer model as an objective source verified by independent analysis that could be easily evaluated by regulators. Generally accepted investment theories include modern portfolio theory, which strongly supports diversification of investments to minimize risk. The proposed regulation should confirm and strongly support the premise that generally accepted investment theories include diversification of investments in terms of both asset classes and single stocks. An individual's age, time horizons (e.g., life expectancy, retirement age), risk tolerance, current investments in designated investment options, and investment preferences of the participant or beneficiary including other assets or sources of income should be taken into consideration.

During the hearing on target date funds, participants' confusion over the timing and amount of liquidity in their accounts became apparent. In particular, issues surrounding the use of "glide paths" were discussed. There was an apparent disconnect between the understanding of participants (who assumed that the target date of the fund was the date that a majority of the account would be liquid) and the managers (who assumed that they would be managing the money until participants were significantly older than their actual ages of retirement) as to the meaning of "glide paths." This issue of the liquidity of the account also occurs when participants use in-plan annuity options as investments. Participants may choose in-plan annuity options and then cash out the option at retirement age, thereby defeating the purpose of purchasing the in-plan annuity option. Liquidity and glide path issues greatly affect asset allocation and time horizons. The regulation does not clearly address this subject either in the computer models or the disclosures provided to participants.

Use of Historical Data

ERISA provides a framework for fiduciaries to act prudently, including choosing investment options for the individuals in their participant directed accounts. ERISA does not specify the types of investments in which fiduciaries must invest. There are few limitations on the percentage of plan assets in a particular investment. Section 407(a)(2), 29 U.S.C. § 1107(a)(2). And, most courts refuse to specify a bright line test on which investments are prudent and what percentage of an investment compared to a plan's total portfolio meet the diversification requirement. *E.g., Metzler v. Graham*, 112 F.3d 207 (5th Cir. 1997) (63% of plan assets in undeveloped property did not violate diversification or prudence requirements); *Donovan v. Mazzola*, 1981 U.S. Dist. LEXIS 17411 (N.D.Cal. 1981), *aff'd*, 716 F.2d 1226 (9th Cir. 1983) (a single loan comprising 12% of total fund portfolio violated diversification rules); *Reich v. King*, 867 F. Supp. 341 (D. Md. 1994) (53% of plan assets in real estate mortgages did not violate diversification or prudence requirements); *Marshall v. Glass/Metal Ass'n & Glaziers & Glassworkers Pension Plan*, 507 F. Supp. 378 (D.Haw.1980) (single loan comprising 23% of plan assets violated diversification rule).

DOL clearly recognizes that the premises of the computer model will determine the recommendations the model generates – as with magicians, the “bunnies in the hat” will predict the result. Unfortunately, economists are not in uniform agreement about what those premises should be. Significant for this discussion is that the research is mixed on whether active fund performance is due to skill or mere luck. Compare R. Kosowski, R.A. Timmerman, R. Wermers, and H. White, “Can Mutual Fund ‘Stars’ Really Pick Stocks? New Evidence from a Bootstrap Analysis”, 61 *J. of Finance* 2551, 2594 (2006) (“Our findings indicate that the performance of the best and worst managers is not solely due to luck, that is, it cannot be explained solely by sampling variability.”) with L. Barras, O. Scaillet and R. Wermers, *False Discoveries in Mutual Fund Performance: Measuring Luck in Estimated Alphas*, at 27 (April 2009), available at http://papers.ssrn.com/so13/papers.cfm?abstract_id=869748 (“Among the 2,076 funds, we estimate that the majority—75.4%—are zero-alpha funds. Managers of these funds exhibit stock picking skills just sufficient to cover their trading costs and other expenses (including fees)” “Further, it is quite surprising that the estimated proportion of skilled funds is statistically indistinguishable from zero (see “Skilled” column).)

There is no question that fees are important to the overall investment return on account balances. There is strong evidence to suggest that passively managed index mutual funds outperform actively managed mutual funds when considering expenses and fees charged by actively managed funds. See *Are Hidden Fees Undermining Employee Retirement Income Security?: Hearing Before the Committee on Education and Labor 110th Cong. 5 (2007)*, available at <http://edlabor.house.gov/testimony/030607matthewhutchesontestimony.pdf> (statement of Matthew Hutcheson, independent pension fiduciary) (citing INDEX FUNDS ADVISORS, INC., OVERVIEW OF THE 12-STEP PROGRAM FOR ACTIVE INVESTORS at 1 (2006), http://www.ifa.com/Book/Book_pdf/overview.pdf) (S&P 500 Index “consistently outperformed 90% of fund managers over the past three years, 97% over the past 10 years ending October 2004, and 94% over the past 30 years”).

Even though some actively managed funds outperform the index after considering costs, past superior performance is not necessarily an accurate predictor of future superior performance. However, reliance on past performance may cause investors to select actively managed funds. INDEX FUNDS ADVISORS, INC, *supra* (“only about 12% of the top 100 of managers repeat their performance in the following years. . . . Therefore, it is not possible to consistently pick next year’s hot mutual fund manager”).

Although historical performance is not necessarily an accurate predictor of future superior performance of actively managed funds, research suggests that it is a positive predictor of future poor performance. A subset of actively managed funds consistently underperforms the market, suggesting that repeated poor past performance should be a factor used to disfavor certain funds. L. Barras, O. Scaillet and R. Wermers, *False Discoveries in Mutual Fund Performance: Measuring Luck in Estimated Alphas*, at 27 (April 2009), available at http://papers.ssrn.com/so13/papers.cfm?abstract_id=869748 (“It is interesting (Panel A) that 24% of the population (499 funds) are truly unskilled fund managers—unable to pick stocks well enough to recover their trading costs and other expenses. In untabulated results, we find that left-tail funds, which are overwhelmingly comprised of unskilled (and not merely unlucky) funds, have a relatively long fund life— 12.7 years, on average. And, these funds generally perform poorly over their entire lives, making their survival puzzling. Perhaps, as discussed by Elton, Gruber, and Busse (2004), such funds exist if they are able to attract a sufficient number of unsophisticated investors, who are also charged higher fees (Christoffersen and Musto

(2002)).”). Of course, fiduciaries in performing their due diligence should not choose these funds as investment options for their plans.³

Unfortunately, index funds may not be the total answer. Index funds may also underperform relative to the market as a whole and even as to their particular asset class, depending on their asset mix and most importantly the stocks actually held in the index fund. So-called index funds do not necessarily mirror the market. “As particular stocks rise in price and constitute a larger portion of an index, there is another problem for investors who add to their fund holdings. They are essentially buying greater proportions of companies that have already risen significantly and reducing their exposure to stocks that have declined. In other words, they are buying high and selling low.” Gretchen Morgenson, “Why an Index Isn’t a Mirror of the Market,” *The New York Times*, April 9, 2000, § 3 (Part 2), at 17, 32. AARP does not believe that current regulations address what can be called an index fund, how the underlying investments are chosen for a particular index fund or what is considered appropriate for a certain asset class. Indeed, a comparison of two mutual funds that claim to be large cap index funds could demonstrate significantly different holdings.

In addition, passive investing can distort the market and continue to subject the investor to market levels of volatility. For example, since the announcement that Berkshire Hathaway would be added to the S&P 500, its stock price rose almost 10% -- part of this price increase was fueled by the automatic flow of investment dollars from index funds. Dan Burrows, *Retail Investors, Rejoice: Berkshire Hathaway Joins S&P 500*, DAILYFINANCE (Feb. 12, 2010), available at <http://www.dailyfinance.com/story/investing/retail-investors-rejoice-berkshire-hathaway-joins-sandp-500/19356394/>.

³ At least three circuit courts have held that in a section 404(c) plan a fiduciary’s duty does not include the selection and monitoring of investment options. See, e.g., *Hecker v. Deere & Co.*, 556 F.3d 575 (7th Cir. 2009); *Langbecker v. Electronic Data Sys.*, 476 F.3d 299, 307 (5th Cir. 2007); *Jenkins v. Yaeger*, 444 F.3d 916 (7th Cir. 2006); accord, *In re Unisys Sav. Plan Litig.*, 74 F.3d 420, 455 (3d Cir. 1996) (*in dicta*); contra, *DiFelice v. U.S. Airways, Inc.*, 497 F.3d 410, 418 n. 3 (4th Cir. 2007). These decisions indicate that courts would permit fiduciaries to choose all underperforming funds as investments option without finding a violation of ERISA’s prudence standards. AARP has previously suggested in our comments to the Department of Labor’s 408(b)(2) proposed regulations that the 404(c) regulation be amended to specifically state that the selection and monitoring of investment options are a fiduciary function. We reiterate that suggestion here because the implications are obvious.

To complicate this issue, the regulation permits the computer model to offer advice only about the investment options in the plan, with one major exception discussed below. If the computer model is skewed towards passively managed funds, but the plan does not have such funds as investment options, will the model be helpful to the participant? Or what if the plan offers only one index fund? Or is the assumption that plans offering investment advice will choose a variety of passively managed funds?

Because the research in this area falls short of definitive, AARP suggests that the computer model should include overall performance over the long run (10+years) factoring in costs and fees. This would enable the computer model to ensure that those funds that have shown long term bad performance would be excluded while shorter term superior performance would not be included since it is not an accurate indicator of future performance. Although there are seemingly very few funds that have long term superior performance, to the extent they exist, the computer model should take these into account. If an index fund does have a history of outperforming such active funds in the long run due to lower fees, then the index fund should be favored in the computer model. If, however, an index fund underperforms (e.g., because the index is not an accurate reflector of the actual market because of the way the underlying stocks are selected) relative to active funds (even those that merely cover their fees and little else), then the computer model should favor the active funds. In addition, AARP submits that significant research should be conducted before committing to the total absence of information on historical returns in the computer model.

Exclusion of Investment Options from Computer Models.

The proposed regulation permits computer models to exclude advice on employer stock, annuities, and target date and lifestyle funds. The proposed regulation's exclusion of these investment options is not consistent with the statutory language that computer models "take into account all investment options under the plan." Moreover, from a pragmatic viewpoint, neither a fiduciary adviser nor a computer model can make a competent recommendation on investments without the recommendation taking into account all investment options, including assets the participant may already have invested in one or more of the excluded options. Most important, participants may discount investment advice that does not consider all of the investment options in the plan.

Unlike disputes over the importance of historical returns and the benefits, or not, of actively managed funds, no one disputes the effect of overinvestment in employer stock in an individual's account. Most, if not all, economists would agree that an excess of employer stock is too risky and potentially devastating to a participant's retirement security due to the lack of diversification. And, most investment advisers would agree that a properly diversified individual should not hold more than even ten percent of their assets in a single stock. Most significantly, Congress thought that ten percent was the maximum exposure appropriate for defined benefit plans and thus statutorily limited such holdings to ten percent (10%) of a plan's assets. Section 407(a)(2), 29 U.S.C. § 1107(a)(2). Even after Enron and Worldcom and the enactment of the Pension Protection Act, employees still tend to own too much employer stock.⁴ *E.g., Wall Street employee owners shudder as Bear Stearns implodes*, MARKET WATCH (March 17, 2008), available at <http://www.marketwatch.com/story/wall-street-employee-owners-shudder-as-bear-stearns-implodes?pagenumber=2>. In these instances, where the employer stock crashes and participants have not properly diversified their accounts, participants may not only lose their jobs, but their retirement security.

Accordingly, AARP disagrees with the Department's position on employer stock in the computer models. Computer models should not ignore this investment option. Instead, it should be treated as any other single stock would be treated in determining proper diversification of an individual's account.⁵

The fact that annuities, if offered under the plan, are excluded from investment advice seems counter to the Department's recently expressed concern that individuals may not have sufficient monies to last through their retirement. See Request for Information Regarding Lifetime Income Options for Participants and Beneficiaries in Retirement Plans, 75 Fed.

⁴ A new research paper of persons over 55 shows that many respondents expressed a preference for having come company stocks. And depending on the manner of the question, most rejected the idea of holding little or no money in company stock. A. Lusardi, O. Mitchell & V. Curto, *Financial Literacy and Financial Sophistication in the Older Population: Evidence from the 2008 HRS* 6-7 (Sept. 2009), available at http://www.mrrc.isr.umich.edu/publications/index_abstract.cfm?ptid=1&pid=653.

⁵ The regulation should also require fiduciary advisers who do not use a computer model to discuss the positive aspects of diversification and the danger of holding too high a percentage in a single stock, including employer stock. We have heard anecdotes where the employer has informed the adviser not to talk about employer stock.

Reg. 5253 (Feb. 2, 2010). If the Department wants participants to understand the benefits of annuities as an option to ensure lifetime income streams, then advisers and computer models should include this option in their advice, if the plan offers it. The proposed regulation should not exclude this investment option..

Finally, with the growing number of plans that include target date and lifestyle funds as investment options, it makes no sense that these options are excluded from investment advice. That is particularly true because research has shown that participants often split their contributions among numerous target date or lifestyle funds and other investment options, thereby taking on too much or too little risk. Ashlea Ebeling, *Investors Misfire With Target-Date Funds*, FORBES (Dec. 17, 2009), available at <http://www.forbes.com/2009/12/17/401k-retirement-vanguard-janus-personal-finance-target-date-funds.html>. Investment advice that includes these funds could help those participants.⁶

Certification

AARP suggests that the regulation should explicitly require the plan fiduciary to obtain the certification from the fiduciary adviser, backed up by the resume of the person or firm providing the certification. Although the plan fiduciary would normally put that request in its contract with the fiduciary adviser, by making it a specific regulatory requirement, it would hopefully avoid fiduciary advisers from refusing to provide this information.

Audit

Although an audit may be a tool for a fiduciary to assess and monitor how well an investment advice program is working, the audits must be meaningful and effective. Consequently, the regulation should establish minimum criteria concerning the scope of the audit, the audit process itself, and the minimum criteria for the auditor's qualifications.

⁶ It is unclear from the regulation whether fiduciary advisers who do not use a computer model to give investment advice may discuss excluded options with participants. The regulation should be clarified that fiduciary advisers must do so.

Currently, if an audit finds that the investment advice arrangements are deficient under the criteria established by the regulation, the auditor must merely notify the Department and the plan fiduciary. AARP suggests that the Department specifically reserve the right to require additional audits or other actions by the plan, including the removal of the investment advisers and/or the review of the computer model.

Timing and Type of Disclosure

AARP strongly supports a rule that any and all disclosures must be provided to participants prior to the offering of investment advice. The regulations do not state a time period for when the disclosures must be provided before the offering of investment advice. AARP submits that “prior” means some period of time before the advice is provided. AARP suggests that fourteen calendar days prior to the provision of investment advice would be a reasonable period of time. Any shorter period would not give participants sufficient time to read, digest and give meaningful consideration to the information in the disclosures.

Finally, AARP submits that there should be some disclosure upon every occasion that the adviser and a participant have contact. After the initial disclosure, the information provided in the following subsections should be disclosed in a one page document at every meeting: subsections 7(i)(A); the total of the amounts set forth in 7(i)(C); 7(i)(D); 7(i)(F); & 7(i)(G).

As demonstrated in AARP’s last survey concerning fee disclosure, *Comparison of 401(k) Participants’ Understanding of Model Fee Disclosure Forms Developed by Department of Labor and AARP* (September 2008),⁷ the manner in which investment information is presented is of paramount importance in determining whether participants are able to use and understand the information. For example, both the DOL and suggested AARP fee disclosure form included information directing the reader how to find additional information; however, a significant percentage of people surveyed who reviewed the Department’s form did not believe that this information was on the form. If confusion can arise based merely on the design of the form, then it should be apparent that information can be easily obfuscated and of little significance to participants. The proposed regulation does not indicate whether the non-mandatory model form was

⁷ Available at http://www.aarp.org/research/financial/ira/fee_disclosure.html.

ever tested through focus groups. If it has not been, AARP submits that in order to assess comprehension and determine adequacy, the model disclosure form should be tested with a random sample of 401(k) plan participants weighted to be nationally representative of all 401(k) participants.

Conclusion

AARP appreciates the opportunity to present its views on the Department's proposed regulation concerning investment advice. Please do not hesitate to contact me at 202/434-3750 or Mary Ellen Signorille at 202/434-2072.

Sincerely,

A handwritten signature in black ink, appearing to read "David Certner". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

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

cc: Joseph Piacentini, Chief Economist and Director of the Office of
Policy and Research
Timothy D. Hauser, Associate Solicitor
William Taylor, Regulation Counsel, Plan Benefits Security Division