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June 10, 2014

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

Re: RIN 1210-AB08; 408(b)(2) Guide

Ladies and Gentlemen:

We are writing on behalf of AARP, the largest nonprofit, nonpartisan membership organization representing over 37 million members age 50 and older, to support the Department's efforts to ensure employers, fiduciaries, and participants are provided the information needed to understand their 401(k) and similar type retirement plans. The Department's proposal to require this information to be provided in a clear and comprehensible format or guide, particularly the fees and charges, will assist fiduciaries to properly evaluate service providers and thus help safeguard participants' retirement security.

AARP seeks to foster the economic security of individuals as they move from work to retirement by increasing the availability, security, equity, and adequacy of pension benefits. A primary consideration in achieving the goal that employees maximize the return on their contributions is the level of fees and expenses per investment alternative. Because fee information often is scattered and difficult to access, it is essential not only that all of the required information be provided, but that it be provided in a manner so that fiduciaries and participants may compare "apples to apples," avoid high and unreasonable fees, and detect potential conflicts of interest.

The shift from defined benefit plans to individual account based plans, such as 401(k) plans, has required a different set of regulatory protections to safeguard workers' retirement security. In defined benefit plans, employers typically make most or all of the contributions, hire professional investment managers, and negotiate for lower fees to reduce employer contributions. In contrast, in defined contribution/individual account

plans, employers select and negotiate the available investment alternatives, but workers primarily are responsible for selecting amongst the alternatives and paying some or all of the fees which can be hidden or expressed in complex terms that few fully understand. Both the Center for Retirement Research and Towers Perrin consultants have found that defined contribution plans have higher fees and worse investment performance than defined benefit plans. Further, the Government Accountability Office (GAO) has found that while employers previously paid most administrative expenses, increasingly employers -- particularly large employers -- are transferring plan expenses onto employees as part of the investment management fees. Even worse, as the Eighth Circuit Court found in *ABB v. Tussey*, some employers may not want to alert employees about the fees for fear workers will not contribute at all to their 401(k) plan.

The consequences of this shift are well documented. According to the most recent Survey of Consumer Finances, the median 401(k) balance for all workers is approximately \$30,000. The median balance for longer term older workers -- those over age 50 with tenure over 10 years -- is only about \$100,000. Numerous surveys repeatedly have found that a majority of workers are worried about their retirement security and do not believe that they will have sufficient assets upon which to retire.

The Department needs to continue its efforts to improve the operation of 401(k) plans so that these plans benefit both employers and employees to the maximum extent possible. The issues related to plan investment alternatives and plan fees have been amongst the thorniest issues the Department and employers face. Most employers and workers are not investment experts. And even though employers legally act as fiduciaries in selecting and monitoring plan investments and fees, employers may not have the strongest incentives to negotiate lower fees since most fees and charges can be passed onto employees. Employers and employees want and need simple understandable disclosure.

The Securities and Exchange Commission has long required a summary disclosure of key fees for mutual fund investments that may provide some useful comparison. Recently, the North American Securities Administrative Association released a report in which it “. . . found a wide disparity among firms in the way fees were disclosed. While broker-dealers may comply with the technical requirements governing fee disclosures, their disclosures lose effectiveness when hidden in small print, imbedded in lengthy account opening documents, or varied in terminology that does not define the service provided. Broker-dealer customers would benefit from greater consistency and transparency in the disclosure of fees.”¹ NASAA recommended that the SEC and FINRA require more uniform disclosures.

¹ <http://www.nasaa.org/wp-content/uploads/2014/04/NASAA-Fee-Survey-4-24-14.pdf>

AARP's prior research has found that participants look to employer plan administrators and service providers to provide investment and fee disclosures. A 2007 AARP nationally representative survey of 401(k) plan participants age 25 and older found that 61% of respondents said employers and 52% said financial service firms should ensure that workers have a clear understanding of plan fees. Participants rely on plan fiduciaries to ensure plan fees are reasonable and provide them with fee information. In order to satisfy this expectation, plan fiduciaries themselves need complete and accurate fee information in one place. The information should be disclosed in advance and in writing for all services to be provided to the plan. Plan fiduciaries have an obligation to read, understand, evaluate, and make prudent decisions in light of all of the disclosures they have received. Fiduciaries may also need to request additional information if prudent to do so.

However, 401(k) and similar type plans do not need to be complicated. Initially, legal documents have to be drafted, recordkeeping mechanisms have to be designed, contributions must be transferred and invested in licensed investments and explanatory materials and reports have to be prepared and periodically updated for participants and beneficiaries. However, once these systems are designed for one company they can be used, by and large, for most companies. Each of these elements has some cost, which the sponsor needs to know in advance. Since the employer is acting as a fiduciary on the workers' behalf, it needs to know the charges to fulfill its fiduciary duty. Finally, if there are costs that workers have to pay, they must be clearly disclosed in a timely manner.

Understandable fee disclosure is critical to retirement security. There is a wide variance in the fees that can be charged and the total fees can reduce retirement nest eggs by as much as one-third. Numerous studies have found that low fees are a predictor of investment success. Low fee investments, on average, have better investment performance over time due in large part to their use of low fee index funds.

401(k) fees also do not need to be complicated. Generally, there are four main costs – initiation/start-up fees, ongoing administrative fees, investment related fees, and individual transaction costs (such as loan fees). If personalized investment advice is provided, it may add an additional fee, but also may be included in the investment management charges. The firms selling services to 401(k) plans know the costs and fees, but like many other sellers, may not disclose them in detail unless required by law to do so. As with any market, the pension investment market can only work optimally if all necessary information is widely available and disseminated to all market participants – buyers and sellers.

The Department took the first step toward a fairer 401(k) plan market with its fee disclosure rules, which generally went into effect in 2012. The Department has now had two years to review the provided disclosures and assess their effectiveness,

understandability and comprehensiveness. To the extent there is a debate as to the understandability of the current disclosures, the Department has full authority under the law to review all documents currently provided to plans. Service providers and others may be willing to publicly share their disclosures so stakeholders can assess their clarity and completeness.

Since the rules went into effect, there has been ample public commentary that some service provider disclosures are not provided in an understandable form. Financial service firms may be providing fee disclosures in multiple documents or places, and in varying formats. Firms may use unclear language and undefined terms. Firms may use the term "may", as in "XYZ fee may apply," rather than disclosing when and how such fees apply. The problem in providing disclosures in this manner is obvious – it makes it much harder for the employer and/or the fiduciary to determine the total costs. Such manner and method of disclosures clearly undermines the intent of the Department's fee disclosure regulation.

The Department's proposed rule takes a balanced approach and only requires a guide if a service provider is disclosing fees through multiple or lengthy documents. In such cases, the service provider should be required to provide a summary or guide for the employer or fiduciary of the pages, sections or other key locators that clearly point to where the key information is located.

An alternative approach would be to require service providers to comply with the rules by providing required information in a single clearly identified section (i.e., Fees, Direct Compensation, Indirect Compensation, Fiduciary Status). The goal should be to highlight all of the key information in one place so employers and fiduciaries do not have to search for or risk missing a hidden charge.² Fees also should be expressed in dollars and cents or through monetary examples whenever possible as this may be clearer to employers than basis points and similar terms.

Information should be provided in a consistent form that allows easy comparison between providers. The Profit Sharing/401(k) Council survey of its members shows that most employers receive documents via paper. The employer/fiduciary should be able to direct the service provider as to the form it wants to receive disclosures. Service providers should not send electronic links to employers who want paper disclosures, and vice versa. The disclosure should be made in the format requested by the employer/fiduciary. In all cases, the information should be clear.

² (There are currently examples of service providers who value the Department's focus on fees and provide summary materials, such as Vanguard's all-in-one fee summary report.)
<https://institutional.vanguard.com/iam/pdf/AllInSample.pdf?...true>

Some financial service firms and employers have publicly stated that they believe summary disclosures are unnecessary. For those employers who believe they have adequate disclosure, we would be open to the Department's consideration of a process whereby employers could attest to the Department or their participants that they have reviewed the fees, monitored the fees, determined the fees to be reasonable and fully disclosed all fees to participants. The Department could add a question on the annual report Form 5500 where the employer could check its monitoring and disclosure of all of the plan's fees and charges.

We also would not oppose the Department's efforts to provide financial service firms with adequate time to come into compliance in order to minimize any costs of summarizing and compiling all of the fees and charges. We also would welcome the financial service industry's public submission of its typical or model fee disclosures and any documentation of the cost to spell out the fees and charges in a summary or guide.

We must continue to rise to the many challenges in achieving adequate retirement savings, and we strongly support and urge the Department to continue its efforts to improve retirement security by requiring meaningful industry fee transparency and understandability.

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 Legislative Policy Director
Government Affairs