Congress of the United States
Washington, DC 20515

August 31, 2010

VIA EMAIL
Phyllis C. Borzi
Assistant Secretary
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, D.C. 20210

Re: Interim Final Regulation under ERISA § 408(b)(2)

Dear Assistant Secretary Borzi:

We write in response to the Department's request for comments on the interim final regulation (the "Regulation") under section 408(b)(2) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). As discussed in more detail below, we urge the Department to (i) modify the Regulation to require that a covered service provider furnish to plan fiduciaries a single written statement detailing all fees and compensation received by the service provider as well as the other disclosures required by the Regulation, (ii) retain the clarification that mere compliance with Regulation does not satisfy a fiduciary's duties under ERISA section 404, (iii) require fiduciaries to pass-through certain service provider disclosures to participants, and (iv) actively enforce compliance with the Regulation.

I. Background

As a preliminary matter, we commend the Department for its efforts to shed light on 401(k) fees being paid by employees and employers. The number of people participating in 401(k) plans grows every year, and these plans are an increasingly large part of peoples' nest eggs as employers move away from defined benefit plans.

For years, participants' 401(k) accounts have been worn away by hidden fees, and although plan fiduciaries have a duty to ensure the reasonableness of service provider fees, they frequently are unable to untangle the complex compensation schemes. As Morningstar recently reaffirmed, low fees are the number one predictor of investment performance. Moreover, the Department and others have determined that hidden and excessive fees may be reducing workers' retirement savings by as much as one-third. Exposing excessive fees by increasing transparency is a critical component of protecting workers' retirement security.

PRINTED ON RECYCLED PAPER

As you are aware, we have been long-time advocates for increased transparency and fee disclosure. We strongly believe that any successful fee disclosure requirement will be based on the following principles:

- Plan fiduciaries and participants must have complete access to information about service providers' compensation and fees;
- Service providers should have an affirmative obligation to disclose all non-*de minimis* compensation and fees they receive in connection with the services they provide to retirement plans (including administrative and investment management fees), and that disclosure should be made in a single document written in a manner understandable by the plan fiduciary; and
- Plan fiduciaries should provide plan participants with full disclosure of all plan expenses and access to service provider disclosures.

Home and car buyers already have such rights and so should the over 70 million workers and retirees who make up approximately one-third of the U.S. capital markets.

II. Comments

The following comments respond specifically to the Department's Regulation:

A. Summary Disclosure

We understand that the Department is considering a modification to the Regulation that would require a statement specifying the fees being charged and providing a roadmap for plan fiduciaries to find more detailed disclosures that need to be understood and reviewed. We view such an addition as essential to the usefulness and success of the Department's Regulation.

The disclosures mandated by the Regulation will be most effective if they are communicated to plan fiduciaries in a clear and consistent manner. In its current form, the Regulation permits disclosures to be made in multiple documents, so plan fiduciaries likely will find themselves overwhelmed by reams of paper and unable to find all of the fees required to be identified by the Regulation. For example, service providers simply could provide plan fiduciaries with copies of prospectuses or investment contracts, which typically are drafted for a broad range of investors and do not specify the particular fees that will be charged to the plan. It should be a primary objective of the Regulation to ensure that the disclosures made by covered service providers include a description of all fees and compensation in one place and in a manner that is understandable to average plan fiduciaries.

Therefore, we urge the Department to modify the Regulation to require covered service providers to furnish the responsible plan fiduciary a single document that highlights all direct and indirect compensation and fees (*i.e.*, investment management, recordkeeping, and all other fees) received in connection with the plan's receipt of services. Ideally, this summary document would be understandable to the average small business owner and would specify exactly where the plan fiduciaries can find more detailed disclosures.

We further recommend that the Department develop one or more sample disclosures that can serve as a model for covered service providers. The Department has issued model notices for many other rules, and those models have been extremely useful in ensuring consistent and accurate disclosure and low-cost compliance.

We are convinced – as are many in the retirement plan community – that the minimal cost of preparing a summary disclosure is greatly outweighed by the benefit increased clarity has to plan fiduciaries (and the participants to whom they owe a fiduciary duty).[1] In fact, we understand that some disclosure-minded service providers already provide a written summary of key terms to their customers because they believe that these up-front summary disclosures reduce their marketing and sales costs.

B. A fiduciary may not satisfy his or her duties by merely complying with the Regulation.

We think it is important that the Regulation continue to make clear that mere compliance with the conditions of the Regulation is not sufficient to satisfy a fiduciary's duty to prudently select and monitor a service provider. As you are aware, ERISA section 408(b)(2) provides exemptive relief for transactions with "parties in interest" that would otherwise be prohibited by ERISA section 406(a). However, it does not, and should not, provide any relief from a fiduciary's obligation under ERISA section 404 to act prudently and in the best interest of plan participants, including ensuring that expenses and compensation are reasonable.[2] In our opinion, the Regulation provides fiduciaries an important tool to satisfy their fiduciary duties because the Regulation puts an affirmative obligation on service providers to comply with the responsible plan fiduciary's request for additional information.

C. Participants should have access to information provided by service providers.

Further, we think the Regulation should impose an affirmative obligation on plan fiduciaries to provide disclosures by covered service providers to participants. We also feel strongly that many of the disclosures (*e.g.*, key fee-related disclosures) should be provided to participants automatically as part of their quarterly benefit statement, which are the disclosures participants are most likely to read. We are hopeful that the Department's forthcoming rule on participant disclosures will impose such a requirement.

---

[1] Many of the comments received by the Department in response to the proposed rule supported requiring some sort of consolidated disclosure statement. *See, e.g.,* Comment Letters from AFS Financial Group (Feb. 28, 2008), James G. Auger (Feb. 11, 2008), AARP (Feb. 11, 2008), ASPPA and CIKR (Feb. 11, 2008), the ERISA Industry Committee, *et. al.* (Feb. 14, 2008), Jeffrey Harris (Feb. 7, 2008), Matthew D. Hutcheson (Feb. 11, 2008), National Coordinating Committee for Multiemployer Plans (Feb. 11, 2008), Pension Consultants, Inc. (Feb. 11, 2008), and Watson Wyatt Worldwide (Feb. 11, 2008). Similar statements were made at Congressional hearings on fee disclosure (See attached).

[2] We continue to believe, as does the Department, that ERISA section 408(b)(2) does not provide relief from the self-dealing and conflict of interest prohibitions in ERISA section 406(b).

D. Service provider oversight should be a top priority for the Department.

Finally, we note that, for the Regulation to have its intended effect, it is important that the Department actively oversee and monitor industry compliance with the Regulation. Monitoring service provider compliance is particularly important because a single service provider's failure to abide by the Regulation could affect many plans. Active enforcement also will provide the Department with the information it needs to evaluate over time whether (i) compliance with the Regulation provides fiduciaries with sufficient information to avoid or mitigate conflicts of interest and (ii) disclosures under the Regulation and other annual reporting requirements, such as the Form 5500, provide complete, sufficient, and timely reporting of all service provider compensation and fees.

* * *

The retirement security of American workers and retirees will benefit greatly from improved disclosure and transparency of retirement plan fees. We look forward to working further with you on these important issues.

Sincerely,

GEORGE MILLER
Chairman
House Committee on Education and Labor

TOM HARKIN
Chairman
Senate Committee on Health, Education, Labor and Pensions

SANDER M. LEVIN
Chairman
House Committee on Ways and Means

MAX BAUCUS
Chairman
Senate Committee on Finance

HERB KOHL
Chairman
Senate Special Committee on Aging

1. **Witness Statements before House and Senate Congressional Committees supporting separate and uniform disclosure of 401(k) plan fees and expenses in order to reduce costs to plans and participants**

401(k) Fair Disclosure for Retirement Security Act of 2009: Hearing before the House, Committee on Education and Labor, Subcommittee on Health, Employment, Labor and Pensions, 111th Cong. (April 22, 2009) (Statement Alison T. Borland).

401(k) Fair Disclosure for Retirement Security Act of 2009: Hearing before the House, Committee on Education and Labor, Subcommittee on Health, Employment, Labor and Pensions, 111th Cong. (April 22, 2009) (Statement of Julian Onorato).

401(k) Fair Disclosure for Retirement Security Act of 2009: Hearing before the House, Committee on Education and Labor, Subcommittee on Health, Employment, Labor and Pensions, 111th Cong. (April 22, 2009) (Statement of Mercer E. Bullard).

Retirement Security: Strengthening Pension Plans: Hearing before the House, Committee on Education and Labor, Subcommittee on Health, Employment, Labor and Pensions, 110th Cong. (May 3, 2007) (Statement of Sal Tripodi).

Hidden: 401(k) Fees: How Disclosure Can Increase Retirement Security: Hearing before the Senate, Special Committee on Aging, 110th Cong. (October 24, 2007) (Statement of Mercer E. Bullard).

H.R. 3185, the 401(k) Fair Disclosure for Retirement Security Act of 2007: Hearing before the House, Committee on Education and Labor, 110th Cong. (October 4, 2007) (Statement of Jon C. Chambers).

H.R. 3185, the 401(k) Fair Disclosure for Retirement Security Act of 2007: Hearing before the House, Committee on Education and Labor, 110th Cong. (October 4, 2007) (Statement of Tommy Thomasson).

Are Hidden 401(K) Fees Undermining Retirement Security?: Hearing before the House, Committee on Education and Labor, 110th Cong. (March 6, 2007) (Statement of Stephen J. Butler).

2. **Witness Statements before House and Senate Congressional Committees generally supporting disclosure of 401(k) plan fees and expenses in order to reduce costs to plans and participants**

401(k) Fair Disclosure for Retirement Security Act of 2009: Hearing before the House, Committee on Education and Labor, Subcommittee on Health, Employment, Labor and Pensions, 111th Cong. (April 22, 2009) (Statement of Kristi Mitchem).

Hidden: 401(k) Fees: How Disclosure Can Increase Retirement Security: Hearing before the Senate, Special Committee on Aging, 110th Cong. (October 24, 2007) (Statement of Barbara D. Bovbjerg).

Retirement Security: The Importance of an Independent Investment Adviser: Hearing before the House, Committee on Education and Labor, Subcommittee on Health, Employment, Labor and Pensions, 111th Cong. (March 24, 2009) (Statement of Charles A. Jeszeck).

Are Hidden 401(K) Fees Undermining Retirement Security?: Hearing before the House, Committee on Education and Labor, 110th Cong. (March 6, 2007) (Statement of Matthew D. Hutcheson).

Are Hidden 401(K) Fees Undermining Retirement Security?: Hearing before the House, Committee on Education and Labor, 110th Cong. (March 6, 2007) (Statement Barbara D. Bovbjerg).