

September 8, 2008

Office of Regulations and Interpretations
Employee Benefits Security Administration
ATTN: Participant Fee Disclosure Project
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, D.C. 20210

Re: Fiduciary Disclosure in Participant-Directed Individual Account Plans

Ladies and Gentlemen:

This comment letter responds to the proposed regulation (the “Proposal”) published by the Department of Labor (the “Department”) under Section 404(a) of the Employee Retirement Income Security Act of 1974 (“ERISA”) in the Federal Register on July 23, 2008. These comments are submitted on behalf of the group of financial service companies for which FMR LLC is the parent corporation (collectively, “Fidelity”). Fidelity companies provide investment management, recordkeeping, communications and directed trustee and custodial services to thousands of individual account plans covering millions of participants.

We support the Department’s efforts to provide a more consistent framework for the disclosure of plan and investment-related information to participants in plans that permit participants to direct investments. Current disclosure practices vary widely among plans and among providers. Even within a single plan, disclosure information may vary considerably among the investment options offered. We understand that 401(k) and other individual account plans provide critical retirement savings for millions of Americans, and that participants must have the information they need to inform both the decision to participate in a plan and the investment choices made under the plan. Accordingly, we supported a more structured approach to participant disclosure in our July 24, 2007 comment letter responding to the Department’s Request for Information (“RFI”) on Fee and Expense Disclosure to Participants in Individual Account Plans.

The Proposal recognizes that fees and expenses are only one component of the information that participants need to consider when deciding to invest their assets in a workplace retirement savings plan. Participants must be provided information that enables them to evaluate the overall investment program offered through the plan, including investment and expense data that is standardized and consistent across the designated investment alternatives. The challenge in the area of disclosure is to provide the information necessary to make an informed decision in a format and context that is understandable by the average participant. We believe that the Proposal in large measure would accomplish that objective.

However, there are aspects of the Proposal that we believe should be revised or clarified to better achieve the Department's stated objectives in issuing the Proposal. Our comments deal with the following topics in the order shown below:

1. Fiduciary Framework
2. Effective Date
3. Disclosure Via Electronic Medium
4. Immediate Eligibility and Automatic Enrollment
5. Comparative Chart Format
6. Investment Data
7. Investment Options Other Than Mutual Funds
8. IRA-Based Plans
9. Regulatory Justification

2. Fiduciary Framework

We understand the desire of the Department to issue participant disclosure guidance under the general fiduciary provisions of Section 404(a) of ERISA – the specific disclosure and reporting rules set forth elsewhere in ERISA don't provide such authority. The Department does need to recognize the challenges, however, in relying on a general statutory provision that does not even refer to participant disclosure. The Proposal would essentially establish a brand new framework for one aspect of fiduciary responsibility. Accordingly, several concerns must be addressed in the final regulation.

First, it is extremely important to foreclose any argument that the Proposal simply clarifies existing law. Particularly in light of the detailed nature of the Proposal, providing plaintiffs with an argument to sue fiduciaries by retroactive application of the final rule would be patently unfair. In fact, even the Proposal will have no effect until the regulation is issued in final form. The Proposal preamble only states that “the Department expresses no view” on this issue for the plans that did not elect to satisfy the disclosure requirements of the regulations issued under Section 404(c) of ERISA. **The Department must make it clear that the Proposal is not intended to have any retroactive effect.**

Second, the Department should confirm that the failure of a fiduciary to satisfy all of the new requirements under the Proposal after the issuance of a final rule is not intended to give rise to new claims of fiduciary breach. Unlike the specific disclosure and reporting provisions in ERISA, Section 404(a) does not include any provisions for monetary penalties. Thus, the general remedy provisions of ERISA would appear to provide the proper context. **The Department should confirm that the fiduciary's responsibility is to follow a prudent process for providing the required disclosure – inadvertent or immaterial errors should not result in unwarranted financial exposure.**

Third, the Proposal would require that the appropriate plan fiduciary provide information about investment options that are generally managed by unrelated parties. The Proposal appears to obligate the plan fiduciary to require the managers of plan investment options to provide it with the necessary investment – related information to enable the fiduciary to discharge its disclosure obligations under the final rule. A fiduciary may, if confronted by an investment manager that refuses to provide the necessary information, be faced with a decision whether to replace the manager in question. On the other hand, the fiduciary (or its designee) may receive incorrect information which the fiduciary reasonably believes to be accurate.

Footnote 7 in the Proposal preamble states that fiduciaries shall not be liable for reasonable and good faith reliance on the comparative chart information provided by their plan service providers. **We ask the Department to confirm in the main body of the final rule that a fiduciary who exercises due diligence in attempting to obtain the necessary information has not breached his or her fiduciary duty solely because the information is subsequently determined to be inaccurate.** We understand that the fiduciary would need to correct the participant disclosures when the inaccuracies come to light.

2. Effective Date

Although the Proposal is worded to take effect for plan years beginning on or after January 1, 2009, the Proposal preamble specifically asks for comment on that aspect of the Proposal. As an initial consideration, we note that the Department is unlikely to issue a final regulation until the fourth quarter of this year at the earliest. Thus, plan fiduciaries would have less than 90 days in which to implement the final rule. Until the regulation is issued in final form, however, it is not feasible to attempt to finalize any preparations to comply with the final rule.

The Proposal would require all participant-directed plans to provide certain information that is not commonly provided at this time and to use a format that is not in general use at this time. In response to an invitation to comment on any administrative or programming costs necessitated by the Proposal, we must point out that the Proposal in its current form will require substantial restructuring of the format and wording of all participant disclosure materials currently in use. In particular, the Proposal would impose more consistent disclosure criteria for investment options not structured as investment companies registered under the Investment Company Act of 1940 (“mutual funds”). The fund managers and plan fiduciaries will require substantial time and effort to prepare for the new disclosure regime. The time estimates provided in the Proposal preamble fail to address any of this implementation effort.

We strongly recommend that the Department provide an effective date in the final rule that provides at least one year of preparation time before it takes effect, but we think that preparation will require a much longer period particularly with regard to

investment options that are not mutual funds. Accordingly, **we ask the Department to adopt a “good faith effort” standard for the first year** in which the Proposal would take effect.

(3) Disclosure Via Electronic Medium

The Proposal would permit mandated participant disclosure to be “furnished in any manner consistent with the requirements of 29 CFR 2520.104b-1 ... including paragraph (c) of that section relating to the use of electronic media.” The Proposal preamble asks for public comment on the use of electronic media.

We think that the Department should continue with the approach taken in its transitional guidance in Field Assistance Bulletin No. 2006-3 (the “FAB”) for the delivery of participant statements required by the Pension Protection Act of 2006. The FAB states that statement delivery may be made in accordance with either Section 29 CFR 2520.104b-1 or the IRS electronic delivery regulation at Income Tax Regulation Section 1.401(a)-21. The FAB also states that the Department will view the continuous availability of pension benefit information on a secure website to constitute “good faith” compliance, provided that participants are notified of the availability of statement information and how to obtain access, as well as their right to receive written disclosure. The FAB states that the notice may be "furnished in any manner that a pension benefit statement could be furnished under this Bulletin." The electronic delivery methods specified in the FAB for such notice are those described in both the Department and IRS electronic delivery regulations.

Although the FAB acknowledged the substantial time and expense that would be incurred by service providers (and consequently, plan sponsors and plan participants) in transitioning to new disclosure requirements, these concerns are even more important on a "go-forward" basis. The Proposal conveys Department recognition that participants who are empowered to make investment decisions need current information about their account investments. We have already shared data with you with respect to Fidelity's favorable experience with making information available via the Internet compared with other means. We want to ensure that this progress is not unintentionally disrupted in the regulatory process.

An increasing number of eligible employees are permitted to enroll in their employer's 401(k) plan by going to a secure internet website and completing the enrollment process online. The investment information required under the existing regulation under Section 404(c) of ERISA is furnished as part of their online experience. It would be extremely time-consuming and expensive to change the medium by which the relevant information is furnished, and such resources would be put to best use in addressing the changes in the formatting and types of the information required under the Proposal.

We have been pleased by statements that the Department is reconsidering the 2002 electronic delivery guidance in general, not just for participant statements, but we understand that this review may not be finished in the near future. **We ask that for**

purposes of participant disclosure, the Department adopt the FAB positions regarding (1) reliance on the IRS regulation as an acceptable alternative, and (2) the use of secure Internet access on a permanent and general basis. We believe that the ultimate beneficiaries of this position are the plan participants, due to timeliness of information, ease of access, and reduced expense.

4. Immediate Eligibility and Automatic Enrollment

The Proposal would require that the plan fiduciary provide the initial disclosure to employees “on or before the date of plan eligibility”. In the case of individual account plans that provide newly-hired employees with immediate eligibility, the proposed timing rule would require the plan fiduciary to provide the required materials on the date of hire - often an impractical approach and one that would have an adverse impact on the use of electronic communications. **We recommend that the Department revise the Proposal to provide that the mandated disclosures may be provided within 30 days of plan eligibility or, if earlier, at the time of enrollment.**

An increasing number of 401(k) plan sponsors have added an automatic enrollment feature to their plan, so that eligible employees are automatically enrolled in their employer’s 401(k) plan unless they make an affirmative “opt out” election. Contributions for such participants are generally invested in accordance with the qualified default investment alternative guidance issued by the Department in final form last year. **We recommend that the Department clarify how the Proposal disclosure requirements coordinate with the final regulation for qualified default investment alternatives for participants who have not made an investment election.**

(5) Comparative Chart Format

A press release issued by the Department to announce the Proposal referred to the use of a comparative chart or similar format as comprising the “centerpiece” of the proposed guidance. The chart has the advantage of consolidating certain information for all designated investment options in one place for the convenience of the participant. At least in certain respects, however, the Proposal chart may be misleading in its simplicity.

First, the chart only lists eight (8) designated investment options. We provide recordkeeping services for some plans that list 200 or more investment options on the plan investment menu, an extremely large universe to capture on a chart. We strongly encourage the Department to consider whether a plan sponsor could, with proper documentation and disclosure, offer a much smaller subset of “core” designated options for which fiduciary due diligence responsibility would still apply. We realize that this may require consideration by the Department of a broader range of fiduciary issues.

In addition, we think that **the separation of the performance table from fees in the comparison chart may prompt participants to focus only on fees, which would be**

contrary to the Department's stated intent. Using the current format, for example, a participant may refer to fees and a one-year performance measure and make an overly concentrated investment in a stable value fund or refer to fees and one or five-year performance and make an overly concentrated investment in employer stock.

Finally, although the Proposal preamble includes a statement that the Department has discussed the Proposal with the Securities and Exchange Commission ("SEC"), **we are very concerned that the format of the Proposal comparative chart may not be consistent with advertising rules for service providers that are broker-dealers,** including SEC Rule 482 and Financial Industry Regulatory Authority ("FINRA")/NASD Rule 2210. For example, to the extent that the Proposal would require that plan fiduciaries provide performance data about each investment option and the performance data does not conform to the SEC standardized requirements for the display of performance information, broker-dealers that distribute plan documents may need to supplement the plan information with additional performance information and disclosures, potentially making the communication longer and more confusing to participants. Accordingly, we ask that the Department confer with these regulatory bodies to help ensure that the final rule will be consistent with the securities regulatory framework.

(6) Investment Data

In addition to shares in approximately 2,500 different mutual funds, we maintain approximately 4,000 interests in other investment options on our recordkeeping platform. **We recommend that comparative chart information in the Proposal be clarified and standardized across all investment alternatives to enable the participant to evaluate the overall investment program offered through his or her plan.**

First, the designation of a fund as "active" or "passive" will not be particularly useful to participants. The designation may even be misleading about the performance of a fund and its risks. For example, a "passive" designation for a small/micro cap fund or international/country fund may convey to the participant an incorrect impression of the fund's concentrated investment risk. Employer stock funds and "enhanced" index funds, on the other hand, could not be characterized as either passive or active. We suggest that the comparative chart should help participants to understand the type of fund in which they are investing their money. **We strongly suggest that Fund Type replace the Management Type column on the suggested Model Comparative Chart.** Our suggested categories for Fund Type are: Mutual Fund, Collective Investment Trust, Separate Account, Annuity, and Other.

Second, the disclosure of benchmark performance faces a number of challenges - the unevenness of their application, the limited availability of benchmarks in certain cases, and the effort and cost of obtaining the corresponding data. Although mutual funds are generally required to identify a "broad-based" benchmark in the fund prospectus, some mutual funds also include a supplemental or composite benchmark deemed by the manager to be more appropriate for the particular fund. This would apply, for example, in

case of a specialty fund or an asset allocation or life cycle fund. **The Proposal should be modified to allow the benchmark disclosure to include the supplemental or composite benchmarks.**

In contrast, many institutional funds (group trusts, separate accounts, etc.) do not currently identify a benchmark or provide benchmark data. In some cases – an employer stock fund, for example - a benchmark may not be appropriate or useful. Stable value funds also present unique problems in this area. Furthermore, many funds have custom benchmarks selected by the manager which are not available through third party vendors nor provided by the investment manager to plan service providers. **Thus, the Proposal should be revised to provide that benchmark disclosure not required for a fund unless the investment manager identifies a benchmark and provides the benchmark performance data to the plan fiduciary.**

Third, we note that the Proposal would require the inclusion of a website address in the mandated disclosure where eligible employees could obtain additional information about fund options. The Proposal preamble acknowledges that many fund managers may not currently maintain such a website. In addition, many institutional funds are maintained for only one plan (a separate account) and the investment manager may not maintain that fund on its web site. If the final rule requires that each manager maintain a website for every investment option, that approach would provide an entirely new mandate for institutional funds and some mutual funds. The aggregated costs for the web site and the maintenance of the information would be substantial. **We would recommend against such a website mandate.**

Fourth, the Proposal also refers to some of the additional information that would be provided by the website. There are different interpretations of the requested investment data. We asked that the nature of the requested information be clarified. We recommend that the final rule explain the meaning of the terms “principal strategies and attendant risks” and the “assets comprising the portfolio” and that the term “investment’s portfolio turnover” be defined as the annual portfolio turnover rate. **To the extent that such information is provided for an investment option, we agree that the final rule should refer to the definitions for funds subject to the Investment Company Act of 1940 (but see (7) below).**

Fifth, the Proposal provides certain exceptions to the investment-related disclosure regime for funds or products “with respect to which the return is fixed for the term of the investment.” See proposed Section 2550.404a-5(d)(1)(D). Although a number of stable value funds and annuity products do provide a fixed rate for a specific period of time, the rate generally changes on a periodic basis. It may be argued that the initial investment decision need not focus on fees and expenses because the rate is already set. However, a subsequent change in rate would generally be determined by a number of factors including expense charges. **We assume that the fixed return exception would apply in such cases, provided that (1) the participant is notified in advance of the new rate, and (2) the participant has the right to change to other**

investment options at the time of the rate change without a financial penalty or charge.

(7) Investment Options other than Mutual Funds

In a number of places in the Proposal preamble, the Department refers to the disclosure framework for investment options governed by the Investment Company Act of 1940 and other security laws. In particular, the Proposal would for all funds adopt the 1940 Act framework for the disclosure of fund total annual operating expenses (e.g., expense ratios), performance over designated one or multi-year periods, and the selection of fund benchmarks provides for some consistency in comparing one mutual fund to another. Several passages in the Proposal preamble solicit public comment on the appropriateness of such standards for plan investment options that are not subject to the same securities law framework.

We strongly suggest that the Department confirm that for funds not subject to the Investment Company Act of 1940, the information to be reported on the comparative chart must conform to the standards applicable under the Investment Company Act of 1940. It may be most helpful if examples could be provided of the calculation of an expense ratio, portfolio turnover and performance for group trust or other institutional funds by reference to specific types of fees and expenses. In Fidelity's written response to the RFI, we acknowledged the value of providing information that would best equip participants to select among the options offered under the plans. Such a comparison is problematical unless the calculation of certain data points is handled in a similar manner for each option.

However, as noted above, the Proposal would require the inclusion of a website address in the mandated disclosure where eligible employees could obtain additional information about fund options. The Proposal also refers to some of the additional information that would be provided by the website. If the final rule requires that each manager maintain a website for every investment option, or that the manager provide such additional information by other means, that would provide an entirely new information mandate for institutional funds. **We recommend against any mandate for institutional funds beyond the investment-related information to be included on the comparative chart.**

(8) IRA-Based Plans

With respect to SIMPLE-IRA and SEP-IRA plans, we believe that information on investment options and related fees are adequately and more appropriately addressed by the applicable IRA provider that the employee ultimately chooses to hold the IRA assets. With these plans, the employee generally has the ability to direct which IRA provider will receive and hold employer contributions and, where applicable, elective deferrals. In the case where a SIMPLE IRA plan mandates that a designated financial institution initially receive those contributions, the employee/IRA owner retains the ability to immediately transfer the SIMPLE IRA assets to another SIMPLE IRA provider without incurring additional fees or penalties.

As a result, unlike with a 401(a) qualified plan, an employer does not know the IRA provider that will ultimately hold an employee's SEP or SIMPLE plan contributions. Additionally, unlike a 401(a) qualified plan, participation in a SEP or SIMPLE IRA plan does not restrict the participant's access to assets; the IRA owner has the ability to withdraw the employer's contributions to the IRA immediately (subject to a potential early withdrawal penalty if under 59 1/2) and can therefore choose to invest or use the assets as they choose. **We recommend that the Department confirm that disclosure for these IRA-based plans will be handled under the relevant securities laws and regulations and the Internal Revenue Code rules governing disclosure for IRAs.**

(9) Regulatory Justification

We note that the Proposal preamble expresses the opinion that cost savings will be achieved by the regulation because participants on average pay “11.3 bps higher than necessary” in connection with the investment options they select, and that improved disclosure will likely reduce the amount by which participants on average overpay.

We believe that there are ample quantifiable benefits from the proposed regulation without resort to any analysis based on an assumption that participants on average pay investment option fees that are higher than necessary. We find no support in the cited materials for the conclusion expressed by the Department of Labor, and have been unable to ascertain the specific assumptions underlying the 11.3 bps figure. More importantly, we believe that the statement can be misread by industry observers to suggest that plan fiduciaries have failed to meet their obligations in selecting investment options, selecting the level of services to be offered to participants, and deciding how to pay for those services. **We urge the Department of Labor to reconsider its assertion**, and to make clear that the Department of Labor does not intend by this “11.3 bps” calculation to infer that any particular plan, or plans in general, overpay for the investment products and administrative services received.

* * * * *

We would be pleased to respond to any comments or questions regarding the issues discussed above or any other aspect of the Proposal.

Respectfully,

Douglas O. Kant, Senior Vice President and

Deputy General Counsel

Legal Department, FMR LLC