



February 11, 2008

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) Amendment

To Whom It May Concern:

Dear Sir or Madam:

With nearly 40 million members, AARP is the largest nonprofit, nonpartisan membership organization representing the interests of Americans age 50 and older and their families. Of our members, more than 45% are employed, full- or part-time.

AARP helps people 50+ have independence, choice and control in ways that are beneficial and affordable to them and society as a whole. We produce AARP The Magazine, AARP Bulletin, AARP Segunda Juventud, NRTA Live & Learn, and provide information via our website, [www.aarp.org](http://www.aarp.org). AARP publications reach more households than any other publication in the United States.

AARP fosters the economic security of individuals as they move from work to retirement by seeking to increase the availability, security, equity, and adequacy of pension benefits. The Employee Retirement Income Security Act's (ERISA) pension protections, and the ability to enforce those protections, are of vital concern to older workers and retirees because the quality of their lives before and after retirement depends upon the adequacy and security of their pension benefits.

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.

The recent enactment of the automatic enrollment provisions of the Pension Protection Act already appears to have greatly increased participation in defined contribution plans. Indeed, AARP has joined with the Financial Industry Regulatory Authority and the Retirement Security Project to encourage 401(k) plan sponsors to help their employees save more effectively by adopting and expanding automatic enrollment and other automatic features. See the website and materials at [www.RetirementMadeSimpler.org](http://www.RetirementMadeSimpler.org).

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>. In order for participants to be able to do so, 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. Because plan expense and fee information is often scattered, difficult to access, or nonexistent, it is not only essential that the information be provided, but that the information be provided in a manner so that plan fiduciaries may compare "apples to apples" when comparing different service providers. Moreover, plan fiduciaries should know whether their plan's service providers have potential conflicts of interest. This may color the fiduciary's decision to contract with that provider, at all; to increase the monitoring of that provider; and to negotiate certain provisions such as reduction of fees as assets increase. Thus, all direct and indirect compensation including revenue sharing should be disclosed.

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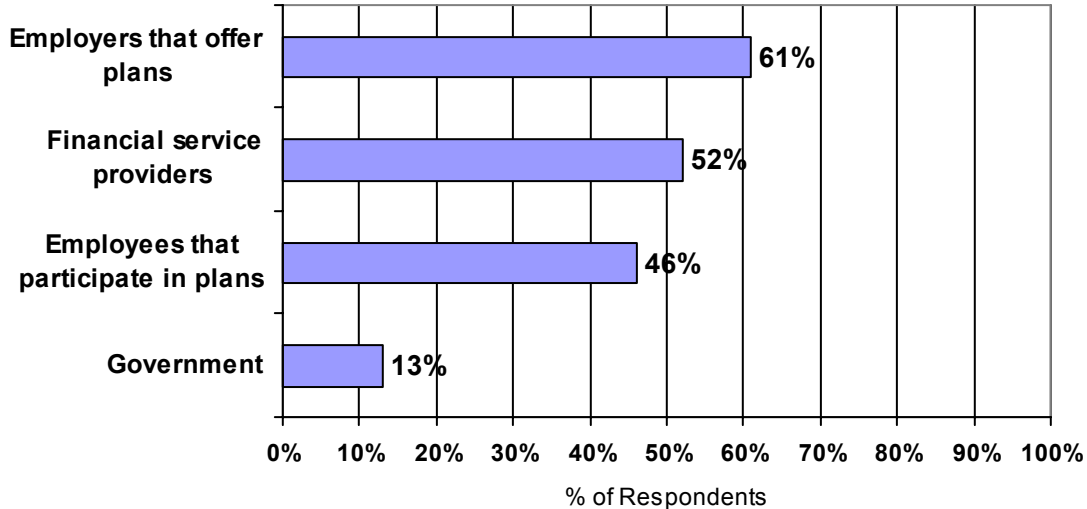
AARP commends the Department of Labor for its leadership on this issue over the past ten years. We also urge the Department to use this comment process to strengthen the proposed regulations, not weaken them. AARP recommends changes to the proposed regulations to make them more workable for plan fiduciaries and to increase the likelihood that plan fiduciaries will receive the timely information they need to prudently review and choose service providers to provide prudent investment options for their plan participants. Of course, should the Department adopt any changes to the proposed regulations corresponding changes may be necessary to the class exemption.

## **WHAT AARP's SURVEY TELLS US**

In July 2007, AARP surveyed 1,584 401(k) participants to gauge their understanding of the fees they pay, and the factors they consider in selecting the investments offered by their plans. AARP Knowledge Management, *401(k) Participants' Awareness and Understanding of Fees* (July 2007), available at [http://www.aarp.org/research/financial/investing/401k\\_fees.html](http://www.aarp.org/research/financial/investing/401k_fees.html).

The survey results emphatically demonstrated that participants look to plan administrators and the plan's service providers to provide plan investment and fee disclosures. When asked who should be responsible for ensuring that participants have a clear understanding of the fees charged by 401(k) plans, 61% of AARP survey respondents said employers, 52% replied financial services companies that manage 401(k) plans and 46% responded employees that participate in plans.

**Who do you think should be responsible for ensuring that people, such as yourself, who participate in 401(k) plans have a clear understanding of the fees charged by 401(k) plans?**



Base: All 1,584 respondents.

Accordingly, participants rely on plan fiduciaries both to ensure that plan fees are reasonable and to provide them with plan fee information. In order for plan fiduciaries to meet these expectations, plan fiduciaries need to receive complete and accurate information in one document in order to compare different

investment options. This is particularly true of smaller employers who do not have the cadre of consultants and attorneys to assist them in their review and determinations.

## **DEPARTMENT OF LABOR FEE DISCLOSURE REGULATIONS**

### General Comments

Sponsors and plan fiduciaries doing due diligence need to have access to costs associated with various components, not just total costs. Requiring service providers to give comprehensive information to plan sponsors is important to participants, since costs are often passed directly on to them. Accordingly, AARP supports the regulation's disclosure requirements that all information be disclosed in advance and in writing; there is a full description of all services to be provided to the plan under the contract; and a description of all direct and indirect compensation and the manner in which it is received is provided to fiduciaries.

AARP suggests that the final regulations more explicitly state that compliance with the final disclosure regulations does not necessarily mean that the fiduciary has complied with its general fiduciary obligations.<sup>1</sup> Indeed, the regulations allude to this concept in the preamble, reminding readers that fiduciaries may still need to request appropriate disclosures from service providers not specifically covered by the regulation. Quite simply, these regulations merely provide an exemption from ERISA's prohibited transaction, and thus act as a floor, not a ceiling. Plan fiduciaries have the obligation to read, understand, evaluate and make prudent decisions in light of the disclosures they have received, and of course fiduciaries must have adequate time to evaluate the information they are provided. 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.<sup>2</sup> 72 FED. REG. at 70993.

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<sup>1</sup> AARP submits that the final regulation should explicitly state that any costs associated with employer stock must be disclosed in the same manner as all other investment options under the regulation's requirements.

<sup>2</sup> 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.

## Services and Compensation

### Definition of Fees and Expenses

AARP applauds the comprehensive definition of fees and expenses which must be obtained by the fiduciary and disclosed by the service provider. AARP also applauds the requirement that brokers report what and how much compensation they receive along with an accounting of services that are being provided – regardless of whether these fees are embedded in a management fee.

AARP agrees that the service provider should state the manner in which it will bill and receive its payments. The service provider should provide to the fiduciary an annual recap of the total fees and compensation it has received from the plan during the plan year.

As the size of a 401(k) plan grows (and for those plans that adopt auto-enrollment the size of the plan may increase dramatically), so do asset based fees, even if the advisor provides little services after the investment options have been chosen. Although it is clear that fiduciaries have a duty to monitor service provider contracts (see below), AARP suggests that the regulations state or guidance be issued suggesting that fiduciaries have a specific duty to review asset based fees on a regular basis. The regulations or guidance may suggest that it is prudent for asset-based fees to decrease at certain trigger points as the assets grow.

### Services

With regard to bundled services, AARP agrees that the price per each individual service need not be disclosed (or unbundled). Instead, AARP suggests that services be unbundled as to certain broad categories - initiation fees; investment related fees; plan administration fees and termination fees; and the fees for those general categories be disclosed. Accordingly, the proposed regulation should require that the service provider offering the bundled services disclose the following:

(1) a description of all of the services which the aggregate price is purchasing;

(2) the entities, other than the service provider making the disclosures, which will be providing the services;

(3) if the service provider has revenue sharing or other indirect arrangements with any of these entities, then such arrangement should be disclosed;

(4) the aggregate fees and expenses for the all of the services;

(5) a break down of the expenses in four general categories – initiation fees; investment related fees; plan administration fees and termination fees;

(6) any charge that is or may be directly charged against the plan's investments, either on a transaction basis or reflected in the net value of the investments, such as commissions, Rule 12b-1 and management fees; and

(7) revenue sharing arrangements.

Currently the proposed regulation excepts "revenue sharing arrangements or bookkeeping practices among affiliates that could legitimately be classified as proprietary or confidential." This exception will engulf the regulation's requirements because many providers will restructure payments to fit within this exception. Whether an arrangement is proprietary and confidential, and whether the arrangement is "legitimately" classified as such raises significant issues, not unlike when the Department of Labor required plans to share their "Usual and Customary Rate" (UCR) determinations with participants. Revenue sharing arrangements should be treated no differently. Without that information, fiduciaries have incomplete information to make a determination concerning the reasonableness of the fees the plan is being charged. AARP supports a bright line requirement that all indirect compensation including revenue sharing be disclosed to plan fiduciaries.

#### Manner in which disclosure is provided

AARP believes the Department of Labor's fee disclosure document on its website should be the standard for the manner in which information is provided to fiduciaries. The same fee information should be given to the plan fiduciary in one document in the same manner. AARP suggests that the regulation be changed to require that fees be set forth as a percentage of assets, regardless of whether they are actually charged in that manner, so that fiduciaries may be able to more easily evaluate the reasonableness of fees. This will enable fiduciaries to attempt to perform an "apples to apples" comparison of providers.

Alternatively, if DOL is committed to letting service providers provide fee information by incorporation by reference, then, at a minimum, the service provider should be required to inform the fiduciary in what page or section the

information is located. (This requirement would be similar to the requirement in the claims regulation where the plan must inform the participant of the specific provision of the plan it is relying upon to deny the claim). Otherwise plan fiduciaries, particularly small business plans, will have to go through reams of paper to attempt to determine where and what the required disclosures are.

### Conflicts of Interest

AARP believes that the disclosure of conflicts of interest, as outlined in the regulations, is a good first step so that fiduciaries may understand the relationships and indirect sources of compensation that may create potential conflicts of interest. The missing piece in the regulation is implicit assumption that fiduciaries will follow up after they receive the answers to the questions. For example, if a service provider can affect its own compensation without the prior approval of an independent fiduciary, clearly the plan fiduciary will need to follow up and ask for other appropriate disclosure. As AARP stated in our General Comments, above, the regulations must be clear that the plan fiduciary may have to do more than merely obtain the disclosures required in the regulations.

### Ongoing Disclosure Obligations

The regulations should be explicit that the plan fiduciaries have an on going fiduciary obligation to monitor those service providers the plan has chosen. The regulation should be explicit that the service provider's obligation to provide information concerning fees and the fiduciary's obligation to request information concerning fees do not end after the service provider contract is executed. AARP suggests that either in the regulation or in guidance that the Department states that monitoring of these service provider contracts should occur, at a minimum, on an annual basis.

### Contract Terms

The proposed regulations require contracts between service providers and plans not only to require disclosures, but also for the service provider to actually perform the required disclosure to the plans. The regulation is explicit concerning the plan's obligation if the disclosures are not provided. However, the proposed regulation is notably silent on the procedure if the disclosures are wrong, incorrect, incomplete or deceptive. Generally in contracts, if there is a material misrepresentation made in negotiating a contract, the contract is immediately voidable at the option of the party to whom the misrepresentation

was made (in this case the fiduciary). However, in order to avoid problems with determining whether there has been misrepresentation, and if so, whether it is material, AARP suggests that a bright line test would be easier for fiduciaries to use. Consequently, AARP suggests that the proposed regulation require that any contract between a fiduciary and the service providers covered by this regulation must permit the fiduciary to void the contract immediately if the disclosures are found to be incorrect, deceptive or not provided.


#### Effective Date

AARP suggests that the regulations be effective for contracts that have not been executed on the date of publication within 30 days of the publication of the final regulation. For contracts executed prior to the final publication date, AARP suggests that the regulations be effective 120 days after the publication date.

#### **CONCLUSION**

AARP appreciates having the opportunity to provide its views on the proposed rules for Fee and Expense Disclosures to Plan Fiduciaries in Order to Meet 408(b)(2) Requirements. If you have any questions, please do not hesitate to contact Frank Toohey at 202/434-3760 or Mary Ellen Signorille at 202/434-2072.

Sincerely,



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