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September 12, 2008

Submitted Electronically

Office of Regulations and Interpretations
Employee Benefits Security Administration
Attn: Participant Fee Disclosure Project
Room N-5655
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, DC 20210

Re: RIN 1210-AB07; Fiduciary Requirements for Disclosure in
Participant-Directed Individual Account Plans; 73 Federal Register 43014;
July 23, 2008

To Whom It May Concern:

The American Bankers Association (ABA) appreciates this opportunity to provide comments to the Department of Labor (Department) on proposed regulations regarding participant-directed account plans. These proposals would require the disclosure of certain plan and investment-related information, including fee and expense information, to participants and beneficiaries (hereinafter collectively referred to as “participants”) in participant-directed individual account plans.

The ABA brings together banks of all sizes and charters into one association. The ABA works to enhance the competitiveness of the nation’s banking industry and strengthen America’s economy and communities. Its members – the majority of which are banks with less than \$125 million in assets – represent over 95 percent of the industry’s \$13.3 trillion in assets and employ over two million men and women. Many of our member institutions provide trust or custody services for institutional clients, including employee benefit plans, as well as services to individuals holding retirement assets in individual retirement accounts. As of December 31, 2007, banks and savings associations held in excess of \$8 trillion in fiduciary assets for employee benefit plan participants.¹ As a result, the Department’s proposed regulation on disclosure to plan participants is of great importance to the banking industry.

The proposed regulations would require that where individual account plan documents provide for the allocation of investment responsibilities to participants, plan fiduciaries must take steps to ensure that these participants are educated regarding their rights and responsibilities with respect to the investment of assets

¹ FDIC Call Report Data, December 2007

held in their accounts. In order to give plan participants sufficient information to make responsible and informed investment decisions, the proposal requires that participants must be provided with a significant amount of plan information, including plan fees and expenses, and designated investment alternatives. Because these changes are sweeping, impacting not only plan sponsors and plan participants but also plan service providers, and the Department has provided only a 45 day comment window, we anticipate providing additional comments as our members study the proposal further and provide us with additional input.

DISCUSSION

While the Department's proposal is certainly well-intentioned, it unfortunately does not strike the right balance between disclosure that a plan participant needs to make an informed decision and disclosure that is confusing, overly complex and possibly even misleading. Our concerns are based primarily on the fact that the Department has proposed a disclosure regime appropriate only for mutual fund products, not one that works well for many other fiduciaries, the institutions that serve those fiduciaries, plan participants, or many of the investment products offered to those participants.

Specifically, **we have strong reservations about this proposal and its impact on bank collective funds.** As the Department is aware, bank collective funds have been steadily growing in popularity among plan sponsors. Part of the great benefit of bank collective investment funds is their flexibility in providing plan sponsors with a product that allows them to adhere to the highest fiduciary standards and, at the same time, offer a low cost investment option for plan participants.

We have the following three overarching concerns regarding the proposal:

1. The Department should not impose a mutual fund disclosure structure best suited for a retail market on bank collective funds, which are only used in the institutional market. Plan participants will lose the benefits of the low cost nature of collective funds if plan service providers are required to create disclosure formats and pricing plans that are structured in a manner similar to those required for registered mutual funds.
2. In all likelihood, plan participants will pay the costs associated with implementing new disclosures. The Department should make every effort to ensure that any proposed disclosure requirements include only that information that is necessary for a plan participant to make informed investment decisions.
3. The proposed disclosure regime leaves open to interpretation many terms and calculations that previously have been required to be used only by mutual funds, regulated by the Securities and Exchange Commission (SEC). Bank collective funds are subject to the Employee Retirement Income Security Act (ERISA) and banking law, not the federal securities laws. We have concerns that SEC interpretations that currently and

appropriately apply only to mutual funds will now govern all investment products, including bank collective funds.

To ensure that bank collective funds remain a viable low-cost investment option for plan participants, we would strongly encourage the Department to work with the banking regulators on a more appropriate disclosure program, one that is focused to ensure that plan participants have the necessary information to make informed investment decisions regarding bank collective funds.

Collective Funds

Since our concerns focus heavily on the impact this proposal will have on collective funds, it is important to understand how bank collective investment funds are structured and regulated. Collective investment funds (CIF) are investment vehicles which consist of assets of multiple retirement plans that are pooled and invested collectively in bank-managed trusts. These trusts are subject to applicable federal and state banking laws and regulations and are established under plan documents that govern how the trusts will be managed and administered.

Participation in a CIF is restricted to ERISA pension benefit plans and governmental plans. These funds are not available to the traditional retail market. As a result, there are regulatory costs that a CIF does not incur, which allows the funds to keep fees low while providing retirement participants the benefit of pooling assets into a larger, more diversified investment vehicle. The combined asset pool also lowers the operational and administrative expenses and helps with risk management for the participating plans. Further, the CIF benefits smaller plans by allowing them to have access to greater investment diversification than may be available as a single trust consisting of assets of only one plan.

CIFs are available in a wide range of asset classes, including large cap, small cap, and long-medium- and short-term bond funds, and a variety of investment strategies such as high yield or growth. In addition, CIFs can be actively or passively managed.

Because assets in CIFs are funds held in trust by banks, the banks and the trusts they manage are subject to examination and oversight by the Department, as well as federal and/or state banking regulators. It is important to note that banks are subject to on-site examination by their primary bank regulator as well as the Department.² These banking examiners assess an institution's compliance with a variety of applicable banking and federal and state fiduciary laws, including ERISA.

CIFs maintained by a bank are exempt from registration under section 3(c)(11) of the Investment Company Act of 1940, while interests in the fund are exempt from securities registration and periodic reporting requirements of the Securities Act of 1933 and the Securities Exchange Act of 1934, respectively. These exemptions are based upon the fact that banks and the collective funds that they offer are already subject to an extensive set of banking regulations, supervision, and

² Depending on the bank's charter, the regulator could be any of the following: the Office of the Comptroller of the Currency (OCC), the Federal Reserve Board (the Fed), the Office of Thrift Supervision (OTS), the Federal Deposit Insurance Commission (FDIC) or a State banking regulator.

oversight. Interests in the CIFs are not; however, exempt from the antifraud provisions of the federal securities laws.

Bank regulations cover a wide variety of issues relating to CIFS, including valuation, audit, investment policies, and the disclosure of fees. CIFs offer great flexibility both in the way advisory fees are assessed for services to a plan as well as the transparency of the fee structure. With bank collective funds, a bank may charge fees to (1) the plan sponsor, (2) the plan itself, or (3) directly to the plan participants. CIFs can vary the fees by plan and negotiate different payment arrangements. Regardless of which entity pays these fees, the fees are a specific expense and are disclosed to the party responsible for paying the fees.

Flexibility in structuring appropriate disclosures is also a hallmark of the CIF. These disclosures are customized to the particular plan and the audience, e.g., plan sponsor or plan participant. Because these disclosures are tailored to each plan, there is no standardized disclosure format for CIFs.

The proposal, if adopted, will force CIF disclosures to look like those of a mutual fund, even though many CIFs are not structured like mutual funds, and the disclosures may, therefore, be meaningless and even confusing to plan participants. This attempt to make all the 401(k) disclosures look the same could impact the availability of certain cost-efficient bank collective fund products. We highlight below some of the more troublesome problems with the Department's proposal.

Fee and Expense Information

The proposal requires a variety of fee and expense information, including the amount and description of each shareholder-type fee, such as sales loads, sales charges, redemption fees, surrender charges, exchanges fees; and the total annual operating expenses of the investment expressed as a percentage (i.e. expense ratio).

The proposal focuses on a mutual fund term, "total annual operating expenses," which is defined in SEC Mutual Fund Registration Form N-1A, Item 3, Instruction #3. CIFs are structurally different from mutual funds, such that the mutual fund disclosure rules do not easily transfer to the collective fund context. Extensive guidance on many very technical issues will need to be provided in order for CIFs to begin to calculate operating expenses to provide to plan participants. For example, one of the more significant uncertainties is how to treat external management fees charged by CIFs. This is not addressed under the mutual fund rules, because all management fees are internal to the mutual fund. However, if the Department intends external management fees to be reflected in annual operating expenses, then there would have to be a different operating expense calculation for each plan that had a different fee arrangement with the same CIF or CIF share class. The plan fiduciary would have to account for this, which would increase the costs for offering the plans and could potentially lead plan fiduciaries who lack adequate staffing and expertise to perform such calculations to select or favor share classes where the fee is internalized, even though they could have negotiated a lower external fee. On the other hand, if the external fee is not incorporated into the operating expense calculation

(which is arguably not required by the SEC rule), then the comparison between a mutual fund and a CIF would be “apples and oranges.”

In any event, this type of mutual fund operating expense disclosure on CIFs will not work without further consideration or accommodation of the unique structural aspects of CIFs and their external fee arrangements. Alternatively, the potential exists for banks to reduce or eliminate external management fee options because of the difficulties and costs of producing performance and expense information in accordance with mutual fund rules. In the end, the ability and incentive of plan fiduciaries to negotiate lower external fees may be greatly diminished, and ultimately could result in CIFs eliminating the option of lower-cost, individually-negotiated external fee funds and share classes.

Lastly, we are unsure as to how to reflect revenue sharing payments or “rebates” that may be made by an investment option’s sponsor or manager to a plan to offset recordkeeping and other expenses. In the mutual fund world, generally, these payments are made outside the fund by a fund service provider who uses the fees or revenues it may receive for providing services, such as by a fund adviser out of its advisory fees, reasonable profits, or other resources. No adjustment is made to reduce the mutual fund’s expense ratio to reflect these payments. Even when the fees are paid directly out of the mutual fund’s assets (such as in the case of 12b-1 fees and shareholder service fees for distribution and shareholder services) to the plan for services provided to plan participants, these expenses are reflected in the mutual fund’s expense ratio. Also, the mutual fund’s performance is not adjusted, because those payments go to the plan or pay for plan expenses. It is not clear how those arrangements should be treated in the case of CIFs that may have similar revenue sharing arrangements. If these payments are not netted, but must be excluded like mutual funds, then such treatment could artificially inflate the apparent cost of the CIFs, especially if there is no other place to reflect revenue sharing and rebates in the plan disclosure; plan participants will get an inaccurate view of the costs associated with investing in the various investment options.

Identifying information

In the section on Identifying information, the proposal notes that each investment alternative will provide an Internet website address which will include certain required information. Most CIFs currently do not have websites because they do not advertise to the retail public. Thus, this requirement to provide information through a website could either force CIFs to create a website to house assorted information that they are not currently required to capture or it could force the plan fiduciary or sponsor to create or enhance its existing website to house the required disclosure information required. Either way, this will increase plan and participant costs and expenses. Second, if an investment alternative (such as a mutual fund) does have its own website and the plan fiduciary, sponsor or administrator makes the very specific reference to information on this third party mutual fund’s website, it could trigger potential antifraud responsibility and liability based on the SEC’s “adoption theory.”³ We are unsure if the

³ See Commission Guidance On The Use Of Company Web Sites, Release Nos. 34-58288, IC-28351 (Aug 1, 2008), <http://www.sec.gov/rules/interp/2008/34-58288.pdf> (“Under Section 10(b) of the Exchange Act and Rule 10b-5, a company can be held liable for third-party information to which it hyperlinks from its web site and which could be attributable to the company.”).

Department considered the potential liability effect of this website requirement and strongly suggest that it reconsider this website approach, particularly in light of the very recent SEC statement.⁴

Among the items listed to be captured on the website are the assets which comprise the investment option's portfolio and their value. We are concerned that this would create an uneven playing field by requiring such information about CIFs but not with regard to mutual funds. This is because paragraph (d)(4)(iv) only requires "a list of assets comprising the portfolio of each designated investment alternative which constitute plan assets ... and the value of each such assets." CIFs are considered plan assets, while mutual funds are specifically excluded under 29 CFR 2510.3-101(h). As a result, CIFs would be required to provide more detailed website disclosure than other investment alternatives such as mutual funds.

If the Department were to require this information for CIFs, we seek confirmation that it would be sufficient to make available Schedule H of Form 5500 that CIFs use to report their holdings annually; that this list of portfolio holdings need not be updated; and that plan fiduciaries would not be expected to provide participants any more current information under paragraph (d)(4)(iv). Turnover rate is another area (to be included on the website) that poses troubling compliance issues. While we understand that SEC Form N-1A proscribes how to calculate portfolio turnover rates (see Instructions 4(c) and (d) to Item 8), CIFs are currently not required to do so. "Turnover rate" requires significant interpretation by the Department, since it has not been utilized in the collective fund context.

We would also note that the SEC does not require money market mutual funds to calculate portfolio turnover rate, since money market mutual funds by nature hold short-term securities and have very wide swings in cash flow that may dramatically increase their portfolio turnover.⁵ Therefore, the Department should clarify whether it intends to override the SEC disclosure requirement and require money market mutual funds offered in these retirement plans to provide portfolio turnover rates. We would suggest that the Department clarify that this is not its intent, and that other similar stable value investment vehicles (such as stable value collective funds) also not be required to provide portfolio turnover rate.

Performance Data

With respect to "performance data," the proposal requires performance data for each investment alternative that will show the average annual total return (percentage) of the investment for 1 year, 5 years, and 10 years previously, as well as a statement indicating that an investment's past performance is not necessarily an indication of how the investment will perform in the future. "Average annual return" is defined as the average annual profit or loss realized by a designated

⁴ Besides being inappropriate for CIFs in general, this aspect of the Department's proposal is deficient in specific ways related to implementation problems. First, the Department's proposal does not clarify that the fiduciary can direct participants to the plan service provider's website, if the service provider's website contains the applicable information regarding the investment options (or links to other websites that contain the applicable information). Second, the proposal does not direct that the Department alert plan fiduciaries, sponsors and administrators of the steps they should take pursuant to the SEC guidance to address and perhaps limit potential liability for hyper linking to third party website information. Those are significant operational weaknesses in the proposal.

⁵ See Instruction 4(c) to Item 8 of Form N-1A

investment alternative at the end of a specified period, calculated in the same manner as average total return is calculated under Item 21 of SEC Form N-1A.

Many CIFs offer multiple share classes whereby some classes internally bear a management fee while other classes charge the management fee externally to the plan sponsor or the participants. These fees are individually negotiated with the plan fiduciary, often at a lower rate than what the other share classes might bear internally. As a result, the net performance for each plan investing in the same fund or share class with external fees could differ. If one were to apply the SEC performance calculations according to the instructions, such external management fees would not be reflected in the total return figure, which would create a potentially misleading, better performance number when compared to other products like mutual funds which charge management fees internally. An alternative approach would be to disclose such an external management fee as part of Administrative Expense under paragraph (c), but we are uncertain as to whether that would permit plan participants to obtain a fair and balanced comparison of investment options. Therefore, the Department needs to provide guidance on whether and how CIFs should report these external management fees so that participants have a clear understanding of the fees. For this reason, we encourage further dialogue among the banking regulators and the industry on developing and proposing for further comment a workable, customized approach that tailors the disclosure rules to the unique structural and operational aspects of CIFs.

Further, while a uniform method of calculating performance data for CIFs may be a laudable goal, we believe the Department's approach is rushed and needs more work. The mutual fund industry and its regulator worked collaboratively for many years to develop the performance calculation rules for mutual funds. The Form N-1A includes six pages of explanation for calculating performance data. This clearly shows that this is a complex calculation that no doubt involves various interpretations. It would be a disservice to the retirement plan and banking industries to apply a rule applicable to CIFs in this hurried and unthoughtful fashion.

Benchmark

The proposal requires that each investment alternative be compared to an "appropriate broad-based securities market index" over the 1-year, 5-year and 10-year periods. There is no appropriate broad-based securities market index for CIFs. Many target date maturity collective funds use proprietary or custom blended benchmarks that consist of proportionate allocations from multiple indices, reflecting the various asset categories of the fund. Given the prominence of target date maturity funds in the retirement plan sector, we strongly encourage the Department to allow maximum flexibility in developing appropriate benchmark indices for comparative purposes (or at least permitting use of one or more supplemental benchmarks) to help make the performance comparison more valuable to participants. Over the years, the SEC has developed a significant amount of guidance on how a benchmark index is chosen for a mutual fund. Since CIFs are not subject to such a requirement, the banking regulators will need time to define what is an appropriate benchmark index.

We would note that the SEC has tried to provide flexibility for mutual funds that include a blend of asset categories and strategies since there is no single benchmark that would be an appropriate

comparison. The SEC has provided flexibility by allowing either supplemental indices to be used (that are more narrowly based to reflect the market sectors in which the mutual fund invests) or the use of other broad-based indices or non-securities indices (e.g., CPI) so long as the comparison is not misleading.⁶ For example, for a balanced fund one may show the S&P 500 as the primary benchmark, but may also include the Lehman Bros. Aggregate Bond index or even a custom benchmark that blends the performance of the S&P 500 and Lehman Bond indices in relative proportion to the fund's allocation. This issue is more prevalent in the retirement plan context because of the proliferation of target date maturity funds being offered, inasmuch as participants more easily understand these plans and the fact that target date maturity funds are preferred as "qualified default investment alternatives" for retirement plans.

Also, we would like the Department to confirm that, in choosing a broad-based securities market index or some supplemental index, the plan fiduciary can exercise reasonable and good faith reliance on the indices used by mutual funds under Form N-1A Item 22(b)(7) and the indices used or recommended by CIFs. We believe this would be consistent with the standard articulated by the Department in footnote 7 of the proposing release that allows plan fiduciaries to rely reasonably and in good faith on their service providers for the disclosure required in paragraph (d)(1) of the proposed rule, particularly given that the mutual funds and CIFs are best equipped to choose the benchmark index for their funds' investment strategy.

If the Department adopts these regulations substantially as proposed, we believe that the continued feasibility of offering cost-effective CIFs to plan participants will be jeopardized and that the Department's well-intentioned efforts to provide plan participants with better information regarding fees and expenses will result in plan participants in fact incurring greater fees and expenses. We strongly encourage the Department to revise this proposal and develop a disclosure regime that provides plan participants with both the necessary information to make an informed investment decision and access to a variety of sponsor-selected investment options, including those offered through CIFs.

We also have the following comments regarding other aspects of the proposal:

Proposed Effective Date

The proposed changes would be effective for plan years beginning on or after January 1, 2009. This is far too brief a time to implement the scale of changes proposed. Such a rule change that would go into effect any sooner than 18 months after the final rule is adopted would be unfair to all of the participants involved. The rule will require significant programming changes and systems enhancements to participant recordkeeping systems to capture the information required by the proposal and to incorporate it into the required format. Much of the content required to be included in the proposed disclosures goes well beyond what is currently included in a typical participant account statement, enrollment booklet, or application form. In addition, there currently are no comparative charts or formats that provide comparisons as required by this proposal. Furthermore, plan fiduciaries will need to negotiate with their service providers and vendors about their expanded roles and responsibilities in compiling and producing this information, which, in all likelihood, will require contract modifications and amendments. The

⁶ See instruction 6 to Item 22(b)(7) of Form N-1A

proposed effective date does not allow sufficient time for these system changes and contract negotiations.

While many of the required disclosures already exist in some form for mutual funds, this is not true for CIFs, as the ABA has previously pointed out.. Bank providers will have to determine how to adapt successfully mutual fund securities form disclosure requirements to CIFs. Less than three months is simply not enough time to come into compliance and is most unrealistic. We note that when the SEC worked with the mutual fund industry to adopt fee table and standardized performance reporting, the Commission permitted over four years to move from proposed regulation to a required implementation date.⁷

In addition, fiduciaries and service providers are already directing substantial resources toward compliance with the revised Form 5500 Schedule C requirements, which are also effective January 1, 2009. To add another significant regulatory compliance effort during this same timeframe is unwarranted and unwise. We reiterate that at least an 18 month delayed effective date after the final rules are issued is required.

Plan Related Information

The proposal calls for a variety of plan and expense information. General plan information must include the specific investment alternatives offered under the plan; participant direction on giving investment instruction to investment managers and placing limits on those instructions; and information on how voting, tender, and similar rights are exercised. The proposal also requires that plan participants must be advised of any material changes to this information within 30 days of adoption.

The proposal should clarify that it is the plan administrator's responsibility to provide this information. The proposed regulation requires that "fiduciaries" give the disclosure information to participants. We presume that the responsibility would generally lie with the plan administrator unless delegated to another fiduciary. Since the plan administrator currently is required to prepare and provide the summary plan description to plan participants, it would be appropriate to assign the responsibility specifically to that person. The Department should make this clear.

A. Administrative Expense Information

Part one of the section on plan related information requires certain administrative expense information, including an explanation (annually) of any fees and expenses for plan administrative services that, to the extent not included in investment-related fees and expenses, may be charged to the plan, and the basis on which such charges will be allocated (e.g., pro rata, per capita) to each individual account.

⁷ SEC proposed a fee table in SEC Release IC-14230 (11/9/84), which was then re-proposed in SEC Release IC-15932. It was adopted in SEC Release IC-16244 (2/1/88), with an implementation date for registration statements filed after 5/1/88. SEC proposed standardized performance requirements in SEC Release IC-15315 (9/17/86), which was adopted in SEC Release IC-16244, with an implementation date of 5/1/88, which was later delayed to 7/1/88 (SEC Release IC-16476).

In addition, the proposal requires that a quarterly statement be sent to each participant that includes the dollar amount actually charged during the preceding quarter to the participant's account for administrative services, and a description of the services provided to the participant for that amount.

We would submit that only administrative expenses that are actually charged to plan participants need to be disclosed. It is not uncommon for some plan expenses to be charged against the plan's cash balance, which may exist as a result of forfeited employer contributions to employees when an employee separates prior to vesting or as a credit received by a plan from revenues received by a trustee based on the assets of the plan. We seek Department confirmation of our position.

We are particularly concerned that quarterly participant fee statements will create the most significant costs and burdens for accounts that include balance forward recordkeeping. Balance forward recordkeeping is a manual restatement of transactions occurring on a separate accounting system. Due to its manual nature, and historically generic description of transactions, disclosure of specific charges to individual participants will require new and labor-intensive processes. Annual disclosure should be sufficient, except when there are new or increased administrative costs that would be important for a participant to know about in a more timely manner.

On a related point, not all fees are assessed quarterly; some are assessed semi-annually or annually. If participants are required to receive disclosures showing actual quarterly amounts, there may be spikes in one quarter and drops in another quarter. Such spikes could create participant confusion and create an appearance of volatility of expenses when it is merely a timing issue. Far less burdensome or confusing would be a standard that quarterly disclosures should instead reflect an annual average so that there are no significant quarterly hills and valleys that could confuse the plan participant.

Further, the Department should permit describing the fees in the administrative expense category in general terms. The preamble to the proposed regulations is unclear as to whether each quarter a narrative would be required as to what actual expenses were charged as an administrative expense. For example, during some quarters legal expenses may be charged and, in another, there may not be any legal expenses. To have to change a narrative on a statement each quarter to note precisely what "administrative expenses" were charged would be unduly burdensome and costly.

Finally, some administrative expenses are assessed based on the assets in the account. If there are significant variations in individual plan participant account balances there also could be fluctuations from quarter to quarter that are not based on changes to the negotiated fee but rather on plan account values. One way to provide a more consistent picture might be to use an illustrative investment amount rather than actual participant experience. We note that the SEC has adopted this approach in requiring mutual funds to use a hypothetical \$1,000 investment amount on fee table disclosure to enable investors to compare mutual fund cost information more easily. As a result, mutual funds are required to provide on a semi-annual basis with their

shareholder reports the “actual cost” that shareholders incur as an investor in the fund, and that cost is based on the fund’s actual expense ratio for that 6 month period on an assumed \$1,000 investment amount.⁸ Therefore, rather than shareholder-specific results for each mutual fund (which would make it hard to compare if a shareholder had different funds with different investment amounts), the SEC requires mutual fund shareholder expense reporting based on the actual shareholder cost of investing in the fund using a uniform assumed amount. This would be a better approach than that presented in the proposed regulation.

B. Individual Expense Information

The proposal requires an explanation (annually) of any fees and expenses that may be charged for services provided on an individual basis. This would include charges incurred in connection with complying with a qualified domestic relations order, providing a participant loan and processing repayments, or providing investment advice services. In addition, the proposal requires a quarterly statement that includes the dollar amount actually charged during the preceding quarter to the participant’s account for these individual services, as well as a description of the services provided.

These are individual expenses that are triggered by a participant’s affirmative action, such as requesting a loan. The prices for these activities or services have already been disclosed to the participant. The repetitive disclosure of this information will merely increase plan costs without adding value to participants.

We would suggest that annual disclosure would be more appropriate than the proposed disclosure requirements for these expenses.

Investment Related Information

A. Performance data

Clarification is needed regarding disclosure of money market mutual fund performance (and we presume stable value collective fund performance). Form N-1A Item 21 differentiates between money market mutual fund performance reporting in paragraph (a) and all other types of mutual funds in paragraph (b). Money funds are only required to provide yields (and there are 4 different types of yield: Yield, Effective Yield, Tax Equivalent Current Yield, and Tax Equivalent Effective Yield).⁹ It is unclear as to whether the Department intends money market mutual funds as well as stable value collective funds to ignore the money market mutual fund requirements of quoting recent 7-day yields in favor of providing 1, 5, and 10-year average annual total returns. Because money fund yields can vary significantly over short time frames it is not appropriate, and may be misleading, to use a 1/5/10 year total return figure rather than quoting 7-day yields. We also note that Rule 482 under the Securities Act of 1933, 17 CFR 230.482, governs mutual fund advertisements and requires money market mutual funds to

⁸ See SEC Form N-1A – Item 22(d)

⁹ While we note that Yield and Effective Yield would be more appropriate to use than the others since participants’ holdings in retirement plans are generally not subject to tax effects, we believe that only one of these two yield calculations should be uniformly required.

disclose a 7-day yield as of the most recent practicable date if these funds provide any type of performance data. The rule does not permit money market mutual funds to advertise average annual total returns without providing a 7-day yield and requires that the 7-day yield be no less prominent than any other type of performance reporting.¹⁰ Therefore, requiring average annual total returns instead of a 7-day yield would run counter to SEC advertising rules.

As for non-money market funds which are subject to paragraph (b) of Item 21 on Form N-1A, there are three different kinds of average annual total return: average annual total return, average annual total return (after taxes on distributions), and average annual total return (after taxes on distributions and redemptions). We would like the Department to confirm that it expects investment options to use average annual total return for this disclosure to plan participants as participant holdings in retirement plans are tax deferred.

B. Fee and expense information

The Department should make clear whether contractual and voluntary fee waivers and expense reimbursements of mutual funds are to be considered in connection with disclosing operation expense information. Over the years, the SEC has developed significant interpretive positions on expense ratio calculations for the mutual fund industry, including whether the fund has to calculate expense ratios using the contractual fee rates when there are fee waivers or expense reimbursements in place. Generally, a mutual fund calculates its expense ratio using last year's actual expenses before waivers or reimbursements, unless there were material changes that would affect the current year, or if there are waivers for a start-up fund period.¹¹ Fee waivers or expense reimbursements can only be reflected in a footnote to the fee table. However, in the SEC's Q&A Letter on Form N-1A, dated October 2, 1998, the SEC staff provided guidance in Q&A #6 that a fund can provide additional lines at the bottom of the fee table, rather than in a footnote, to show the net effect of "contractual" fee waivers and reimbursements ("contractual" generally being in writing with at least one year duration). It is unclear whether the comparative chart should disclose for each investment option the Total Expense Ratio before or after such contractual fee waivers and expense reimbursements. Similarly, additional guidance is needed on whether plans and investment options are to show Total Expense Ratios before or after reflecting "Acquired Fund Fees and Expenses" where a CIF or mutual fund invests in underlying funds.¹²

Company Stock

The proposal does not address those plans that provide participants with the ability to invest, through the plan, in company stock, whether publicly traded or privately held. As the Department is aware, company stock is an investment option in a significant number of plans. The 2006 General Social Survey showed that 20 million Americans own stock in their company

¹⁰ See Rule 482(e) and (g).

¹¹ See N-1A Item 3, instructions 3 & 5

¹² See Instruction 3(f) to Item 3 of Form N-1A. In 2006, the SEC revised the mutual fund expense ratio disclosure by requiring a fund to disclose the impact and to aggregate in the fund's total operating expenses and fees the operating expenses and fees of any underlying funds it owns. Bank collective funds utilize similar fund of fund structures, particularly in target date maturity funds where assets may be invested and rebalanced among different funds that focus on particular investment strategies (i.e., equity, bond, international, short-term securities). Thus, further guidance is needed on how the mutual fund rules should be applied to collective funds.

through a 401(k) plan.¹³ In addition to benchmark disclosures discussed above, there are many other aspects of this proposal that do not lend themselves to company stock investment options, including description of investment strategies and risk and total expense ratio and total return disclosures.

The most reasonable resolution of this issue is for the Department to define “designated investment alternative” to exclude employer stock.

Comparison Chart

The Department has proposed that plan and investment information be provided to participants in a chart or similar format that will facilitate comparison of the information for each investment alternative available under the plan. In addition, this comparison chart must include a notation that more current investment-related information would be available at a listed Internet website address.

We assume the Department will allow omission of fixed return column if it does not apply to any of its investment options rather than keeping the column all filled in with “N.A.”

We would also note that the Part II Fees and Expenses Information model chart has a third row that is titled, “Shareholder/Shareholder-type Fees.” This terminology is inaccurate for the plan participant world and should be changed from “shareholder” to “participant.” The Department should also clarify that the term “Shareholder/Shareholder-type Fees” does not encompass 12b-1 fees or shareholder servicing fees that are already taken into account in calculating a mutual fund’s expense ratio.

Also, if the Department intends to capture the types of expenses that are labeled “Shareholder Fees” in the mutual fund fee table per Item 3 of Form N-1A, and Instruction 2 to the Item, then the Department should make that clear and perhaps provide guidance that non-mutual funds may comply with this requirement by identifying similar types of transaction-based, separately-assessed fees paid out of the participant’s investment.

Additional Information

The proposal calls for the provision of the following additional information if requested by a participant or beneficiary:

- copies of prospectuses;
- financial statements and reports that the plan receives;
- a statement of the value of a share or unit of each designated investment alternative, and
- a list of the assets comprising the portfolio of each designated investment alternative, and the value of each such asset.

¹³ Information about the General Social Survey can be found at <http://www.gss.norc.org/>

CIFs and certain other investment options do not prepare prospectuses. These would be expensive to create and would increase the costs of CIFs and these other options of separately managed accounts without much benefit. The Department should confirm that CIFs are not required to produce new forms of disclosures or other information beyond what is otherwise already required by bank regulators or by the specific information requirements of this proposed rule.

Cost-benefit Analysis

While there are many parts of the analysis with which we disagree, particularly the amount of time needed for legal experts to assist affected parties in complying with the regulation and the assumed hourly rate for an attorney with ERISA expertise, the ABA would like to offer the following comments for the Department's consideration.

Costs of Distribution and Materials Due to the Disclosure of Plan and Fee Information

The Department assumes it will take two minutes for clerical staff to collate and send out the disclosure. This does not take into account the compiling of information, determining who must receive it, as well as creating a database with e-mail address or mailing labels. There would also be programming costs, as well as preparation of materials to mail, if certain participants are not reachable via e-mail.

No Programming Costs are Factored into the Analysis

The Department fails to incorporate any data on the substantial costs for programming to create or enhance plan websites, provide annual disclosures, add quarterly information to statements or otherwise produce quarterly information, or create the comparative charts. The costs to comply with this proposed regulation should not be underestimated. Our members tell us that they will be substantial.

No Correlation between lower fees and better performance.

In Table 2, the Department mistakenly assumes that if you choose an investment with lower fees, then it automatically means you will have better performance. If the manager makes poor selections in picking stocks, the cost does not matter because the performance will be poor and the participant will experience poor returns.

Plan Participant Decisions Alone Will Not Lower Fees

Table Number 15 incorrectly states that an individual plan participant may make a decision that will lower the plan's fees. Plan fiduciaries, not participants, make decisions that could potentially lower fees.

CONCLUSION

In conclusion, while ABA appreciates the well-intentioned efforts of the Department to provide plan participants with information needed to make an informed investment decision, we do not believe the Department has struck the right balance. Rather, we believe the proposal could, in fact, harm participants by raising the cost of CIFs or to some significant degree eliminating them altogether. We are particularly concerned about the Department's decision to rely so heavily on a mutual fund disclosure regime that does not work for other popular plan investment option products, such as CIFs. We would urge the Department to work with the banking regulators and the industry to fashion a solution satisfactory to all. The ABA stands ready to work with the Department to achieve the proposal's important goals.

Sincerely,

A handwritten signature in cursive script that reads "Lisa J. Bleier". The signature is written in black ink and is positioned above the printed name.

Lisa J. Bleier