H.R. 1984, 401(k) FAIR DISCLOSURE FOR RETIREMENT SECURITY ACT OF 2009

HEARING

BEFORE THE

SUBCOMMITTEE ON HEALTH, EMPLOYMENT, LABOR AND PENSIONS

COMMITTEE ON EDUCATION AND LABOR

U.S. HOUSE OF REPRESENTATIVES

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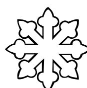

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H.R. 1984, 401(k) FAIR DISCLOSURE FOR RETIREMENT SECURITY ACT OF 2009

Wednesday, April 22, 2009
U.S. House of Representatives
Subcommittee on Health, Employment, Labor and Pensions
Committee on Education and Labor
Washington, DC

The subcommittee met, pursuant to call, at 10:30 a.m., in room 2175, Rayburn House Office Building, Hon. Robert Andrews [chairman of the subcommittee] presiding.

Present: Representatives Andrews, Hare, Tierney, Kucinich, Fudge, Holt, Kline, Guthrie, and Roe.

Also present: Representatives Miller and McKeon.

Staff present: Aaron Albright, Press Secretary; Tylease Alli, Hearing Clerk; Jody Calemine, General Counsel; Fran-Victoria Cox, Staff Attorney; David Hartzler, Systems Administrator; Ryan Holden, Senior Investigator, Oversight; Therese Leung, Labor Policy Advisor; Alex Nock, Deputy Staff Director; Joe Novotny, Chief Clerk; Megan O'Reilly, Labor Counsel; Rachel Racusen, Communications Director; Meredith Regine, Junior Legislative Associate, Labor; Michele Varnhagen, Labor Policy Director; Mark Zuckerman, Staff Director; Robert Borden, Minority General Counsel; Cameron Coursen, Minority Assistant Communications Director; Ed Gilroy, Minority Director of Workforce Policy; Rob Gregg, Minority Senior Legislative Assistant; Alexa Marrero, Minority Communications Director; Jim Paretti, Minority Workforce Policy Counsel; and Linda Stevens, Minority Chief Clerk/Assistant to the General Counsel.

Chairman ANDREWS [presiding]. Good morning ladies and gentlemen. The subcommittee will come to order. We would like to thank you for your participation here today. We are honored to have our chairman, George Miller, with us; our senior Republican member, Buck McKeon, with us. And you will be hearing from each of those two leaders in a moment.

In the news report which discussed the chairman's efforts to provide more disclosure to American investors and pensioners, an industry representative said that the 401(k) system is about "freedom and choice and personal responsibility."

We agree completely, which is why the legislation that the chairman has introduced, and that I support, provides people with the basis to make an intelligent choice about a decision so important to their future.

It is common to the American experience, that when you buy something, the person who sells it to you tells you what gets built into the price; tells you what components make up the money that you are paying.

It is kind of sadly ironic that, with an asset as important as someone's retirement account—and for many Americans, their defined-contribution account is their only retirement account—that the law does not presently require that investors and workers be given the right to know what they are being charged for.

I think most people would be astonished to hear this—that if they went to the people who are managing their retirement savings and said, "I notice that you took $500 out of my $50,000 balance last year,"—or "$750 out of my $50,000 balance last year"—"What did I get for it?"—that, under the present law, they don't have the right to know that.

The bill that the chairman has introduced changes that. And I believe it changes it in an effective and useful way for employers, and for employees. The consequences of not being able to make an intelligent choice about one's self-directed account are rather extreme. Research done by the General Accountability Office concluded that a 100-basis-point difference—that is to say the difference between a 1.5 percent fee and a 0.5 percent fee—over the course of someone's lifetime, could make a 20 percent difference in how much is in their retirement account.

Let me say that again. The person who pays a fee of 0.5 percent, versus a person who pays a fee of 1.5 percent—when she retires, may have 20 percent more—the person paying the 0.5 percent may have 20 percent more than the person who paid 1.5 percent.

Now, in some cases, you should pay the point and a half, because it is the right thing for you. But the purpose of this bill, and a related discussion that the subcommittee has been having about qualified independent investment advice—a subject that we will be revisiting—the purpose of this bill is to be sure that the important material facts, the critical facts, that are necessary for someone to make an intelligent choice are in front of that person.

The legislation accomplishes three tasks. It requires important material disclosure to both employers and employees about what the fees are, and what they are going for. It requires the disclosure of any conflicts of interest that may exist between the person collecting the fee, and any of the firms that are managing the money to which the accounts are given. And, finally, it requires that all Americans who are in defined-contribution plans be given the opportunity—practically requires this—but be given the opportunity to choose a low-cost index-fund type option, as opposed to an actively managed option.

No one has to do it. No one is required to do anything. But it says that people who wait on tables or teach school or drive buses or build houses for a living ought to have the same range of choices that wealthier people do, when it comes to how their money is managed.

I think this is eminently reasonable, eminently workable and eminently fair. And so when those who believe in this system—and I do—say that the 401(k) system is about freedom and choice and personal responsibility, we agree completely. People should have

the freedom to choose what is best for them. They should have qualified independent investment advice so they can evaluate what is best for them.

They ought to know the material facts about what is being taken out of their account, and why, and by whom, so they can make the best choice among the options in front of them. And then, yes, they will take personal responsibility for the consequences of their choice.

So the bill that is before the subcommittee, and will—hopefully before the full committee shortly—I think furthers that agenda. We look forward to hearing from the witnesses this morning, and from our colleagues on the committee, as we explore these issues.

By agreement, would the ranking member of the subcommittee—we are going to have statements from the full-committee chairperson and ranking member as well. At this point, I would like to yield to whichever of my friends on the Republican side would like to speak first.

Would that be you, John?

[The statement of Mr. Andrews follows:]

Prepared Statement of Hon. Robert E. Andrews, Chairman, Subcommittee on Health, Employment, Labor and Pensions

Good morning and welcome to the Health, Employment, Labor and Pensions Subcommittee hearing on the 401(k) Fair Disclosure for Retirement Security Act of 2009 (HR 1984), which is authored by my good friend and Chairman of the Full Committee, Congressman George Miller.

Thanks to his leadership, American workers across the country will become more aware and better informed about what they should be getting out of their 401(k). I am honored to be an original co-sponsor of the bill as well as to working closely with the Chairman to craft what he and I strongly believe to be one of the most important measures before us today that will help restore worker trust and confidence in our retirement system.

American workers across the nation have suffered tremendously due to last year's economic downturn; particularly, Americans who were laid off lost a significant amount of their retirement savings or both. At the end of 2008, a total of 2.8 million American jobs were lost and retirement accounts were reduced by $2 trillion dollars overall, shattering the financial goals of many hard-working Americans.

Those most devastated by the market downturn were those workers nearing retirement who lost close to 30 or more percent of their 401(k) account. Disturbed over the market's unexpected effect over their retirement savings, workers who were impacted the most, as well as many others are further troubled by the lack of transparency of their 401(k) system. When a worker spends most of their lifetime investing their hard-earned dollars into an account for their retirement and later learn that they were being charged fees that contributed to a significant loss of their nest egg, they understandably lose trust and confidence the system. The lack of transparency in the 401(k) system is unacceptable and must end now.

The Members of the HELP Subcommittee have before them today a bill that improves the 401(k) system and protects the worker by requiring transparency and disclosure of fees to the employers and employees. Under our current 401(k) system, there are a numerous instances where employers are not informed, prior to entering into an agreement with financial service provider, about the true cost of certain fees and services included in their "bundled service arrangement" plan. Equally important, HR 1984 requires disclosure of fees to workers that is both clear and understandable.

When Jack Bogle, founder of Vanguard, testified before the full committee in February of this year, he made a compelling argument in favor of providing every worker with the option to invest his or her retirement savings in an index fund. Under HR 1984, we provide a strong incentive to employers to ensure an index fund option is offered to their employers.

Chairman Miller and I strongly believe the 401(k) Fair Disclosure for Retirement Security Act of 2009 moves us in the right direction to improve the 401(k) system.

You will hear from several of the witnesses on our panel today, who work on a day-to-day basis in the 401(k) world, echo our position.

Another important solution, which I will address further during the hearing, is restoring the conflicted investment advice prohibition under ERISA, while allowing workers to receive investment advise that is independent and in the interest of their retirement goals.

I look forward to hearing all the witness testimony and welcome you to the HELP subcommittee.

Mr. KLINE. Thank you, Mr. Chairman.

Good morning to you all.

I want to welcome the panel of distinguished witnesses this morning. Some of you have been with us before, and some of you are new. We are glad to have you all.

Today, as the chairman indicated, we return to a debate that we started in the last Congress, specifically regarding the nature and transparency of fees charged to 401(k) plan participants, and how best to address that issue.

The bill that we are discussing today was introduced yesterday. So we have not had much chance to look at it. But we have been assured on this side that it is the same as the bill was last year. Is that correct? Okay.

That is the assumption that we are working on as we go——

Chairman ANDREWS. If the gentleman would yield—my understanding is there are some very, very technical changes, like the captions. But, substantively, yes, the bill is identical to last year's.

Mr. KLINE. Okay. We will take that at face value, and go forward.

I hope that as we go forward in the discussion today, and we listen to the testimony of our witnesses, and we engage in the discussion ourselves, that we are, in fact, guided by facts, and not by rhetoric. Clearly, the economy is in great trouble. We are in a recession. The value of people's savings, whether it is retirement or education, or anything that they have put away, has fallen dramatically.

But I hope that we recognize that the tumbling economy is behind this loss in value, and not 0.5 percent or 1 percent or 1.5 percent fee, which works out to, for most 401(k) holders, a medium amount of just over $300 a year. And we have had people who have lost thousands and tens of thousands of dollars. And, frankly, it is not because of fees.

American workers are rightly concerned. And we have important work to do in this Congress, and in the government to address their concerns on how to strengthen their savings and give them more options. We have, for example, on our side of the aisle—we are introducing, today, legislation that will address some of those concerns, allowing people with 401(k)s to not be forced to withdraw their savings at 70½, and extending that for another couple of years—so we are not forcing people to withdraw savings when the market is perilously low.

I think we have real issues out here. This is an important debate. I am look forward to hearing from the witnesses. I would just ask all of us to focus on the facts. We have got real experts here.

And, Mr. Chairman, I ask unanimous consent that my statement be entered in its entirety.

Chairman ANDREWS. Without objection.
[The statement of Mr. Kline follows:]

Prepared Statement of Hon. John Kline, Senior Republican Member, Subcommittee on Health, Employment, Labor, and Pensions

Good morning, and welcome to our distinguished panel of witnesses. Some of you are making a return appearance before the Committee, and we appreciate your efforts to continue to provide us with your expertise on issues of such national importance. Others are joining us for the first time, and we look forward to your new perspectives.

We return today to a debate we started in the last Congress, specifically regarding the nature and transparency of fees charged to 401(k) plan participants, and how best to address that issue. We have before us this morning a bill that was introduced yesterday—providing insufficient time for staff on our side—not to mention the witnesses before us this morning—to review in any sort of detail. Republican staff has been advised that the bill we are discussing is substantively identical to the fee disclosure legislation we voted to report out of this Committee in April of last year—an amended version of the bill originally introduced by Chairman Miller. On that point, Mr. Chairman, I take you and your staff at face value, and accept as a matter of faith that we are discussing materially the same bill that received a vote in Committee last year.

As we take up this debate, let me say first that we must be guided this morning by facts—not rhetoric. In previous hearings, we've been painted a sinister picture of greedy financiers "raiding" employees' 401(k) plans and robbing them blind through exorbitant pension fees.

Mr. Chairman, I submit we stick to the data. When you run the numbers, an individual with an average 401(k) account balance would have paid a median total of pension fees of roughly $346 per year. Those with lower-than-average balances—such as lower-income workers—would, obviously, pay even less. I welcome a fair debate about the appropriateness and transparency of pension fees—and I hope we can proceed today without hyperbole or fear-mongering—in either our language or our action.

In the same vein, I would encourage my colleagues to avoid grandstanding and posturing here this morning. Specifically, I would hope none of us yields to the temptation to characterize the dramatic decline in many workers' 401(k) plans as simply an issue of "fee disclosure."

American workers and retirees are justly upset and frightened by the dramatic effect the market downturn has had on retirement savings. But we do no one a service—indeed, we do a great disservice—to suggest the cataclysmic failure in our markets are no more than a function of so-called "hidden" fees or corporate raiders. The dramatic loss in retirement savings was not caused, nor would it have been avoided, by the difference of a fraction of a percent in an investment fee.

Mr. Chairman, you may recall that debate on this bill last year generated substantial concerns from committee members on both sides of the aisle. I hope that as we start the process fresh this year we are both willing and able to work together to forge common ground on how we might improve pension fee disclosure under ERISA. As I said during our markup last year, I stand ready and willing to join you in this effort.

Indeed, as we address our retirement system more broadly, I hope we explore genuine efforts to help Americans rebuild their 401(k) nest eggs, as packages brought forward by our Republican Leadership—including the Savings Recovery Act, which is being introduced today—are prepared to do. Among its provisions, our bill would enable seniors to keep more of their retirement savings by further suspending the mandatory withdrawal that requires a certain portion of retirement savings to be withdrawn after an individual turns 70½ or retires. This provision protects the investments of seniors and retirees at a time when the value of their accounts is low—and is just one of the many factors worthy of discussion as we consider how to help Americans rebuild their savings.

That said, we have an excellent panel of witnesses here before us this morning, and we should hear from them directly. I thank the gentleman, and yield back my time.

Chairman ANDREWS. I thank the gentleman from Minnesota.

In 2006, long before the market had melted down, long before loss of retirement savings was an issue on the top of a lot of peo-

ple's list, the chairman of the full committee—at that time, the ranking member of the full committee—had the foresight to ask the General Accountability Office to look at the issue surrounding fees in defined-contribution accounts.

That request by Mr. Miller led to a series of reports, which, in turn, led to extensive hearings by our full committee and subcommittee, which, in turn, has led to the legislation in front of us today.

So we are very honored that the chairman of our full committee, George Miller, is with us. And I would yield to him at this time.

Mr. MILLER. Thank you, Mr. Chairman, and thank you to the subcommittee, for holding this hearing. This is a continuation of an effort that, as you know, was started a couple of years ago, to make sure that we could keep the 401(k) safe and secure and sustainable, by strengthening the various aspects of the 401(k), so that more people would participate, but they would participate with greater knowledge.

As we have come through the various congressional hearings of this committee, we have found that the current law does not require disclosure of all fees levied by financial-service firms against the participants' accounts. And I think we will hear again from this panel not only a reaffirmation of that fact, but also some very, very good suggestions—as I read the testimony yesterday and today—some suggestions how even this bill—it is hard for me to believe it can be improved—but how even this bill can be improved on that—on that item—so that we will have a better-informed—it is one thing just to talk openly about choice. The choice itself is the value. But choice itself can be confusing if it is not accompanied with good information.

And in this case, that information is very, very important to the retirement security of our citizens. As you pointed out, small differences, over a long period of time, can make a huge difference in terms of the resources that an individual or a family will have available to them for their retirement.

You mentioned that we could see a 20 percent difference over the working life of that individual or that family. A couple of weeks ago, the founder of Vanguard, Jack Bogle, testified that the hidden turnover costs in many mutual funds could wipe out 75 percent of an individual's investments gains over a lifetime.

The 401(k) account holder is the last person in the Wall Street food chain to get paid. As he said, "If we can't get the croupiers out of this business, the participants are destined to lose."

And it is especially difficult time in this country that this hearing, and the previous hearings—is at a time when millions of Americans are out of work, struggling to make ends meet. The best-laid plans of families—we have all heard it from individuals in our districts—have gone up in smoke because of the financial scandals and meltdown that have taken place.

And as they have seen a dramatic reduction in their retirement resources—we all have the anecdotal stories of people telling us they are going to work longer, they are going to go back to work, their spouse is not going to be able to retire, or, simply, that they now believe they will not have enough money for retirement. And

the previous options of going back to work are not available to them.

I think this is an important subject because, as we learn more and more about financial services in this country—there is more and more concern among the public.

All of us have just returned from 2 weeks of being home in our districts. And the anger, the fear, is palatable for our constituents. I think when we understand that we see the manipulation of credit card interest rates without the knowledge or the understanding of people who are holding those cards—when we understand that almost half of the subprime loans made in California could have been prime loans, but there were incentives to getting higher interest rates for the securitization of those loans, so the subprime loans were issued instead.

And we now see, again, in predatory lending, where bonuses are paid for higher interest rates put on the same people who could have had it at a lower interest rate, given their credit rating, and the rest of that.

And that is to suggest that what we now need is transparency in the financial-services industry. And the 401(k)s are deeply involved, because that is where they turn to try to build the security and the safety for their retirement.

I believe that this legislation will provide workers with clear and complete information about the fees that they are paying. It simply requires financial-service firms to tell their account holders how much they charge for their services. The bill will also require service providers to inform employers of the cost that the employees will bear, and the potential conflicts of interest. Employers should, likewise, be armed with accurate data so that they can shop around.

Next, the bill will require that in order for employers to receive limited liability against participant losses, that one low-cost index fund would be included in the menu of investment options. We have heard over and over again that nothing beats the performance fees or simplicity of the index fund. This bill will also strengthen the Department of Labor's oversight of 401(k)s.

I would hope that this bill would not be controversial. I think that, as we struggle in the Congress, on almost a daily basis, with financial services in this country, that we would now come to understand that transparency is the watchword. It is in every reform proposal, whether it is here or in Europe, or anywhere else in the world.

And so that transparency, accompanied with proper oversight, I think, will give a better selection of choices and greater security and information to workers, as they join the 401(k) savings proposal to try to provide for their retirement.

Thank you, again, for holding this hearing.

I look forward to the testimony of all of the witnesses. And I thank you for your time and your expertise that you are lending to the committee today.

Chairman ANDREWS. Thank you, Mr. Chairman.

Without objection, I would like to enter into the record a—a letter from the Secretary of Labor, Hilda Solis, with respect to this issue—without objection.

[The information follows:]

THE SECRETARY OF LABOR,
Washington, DC, April 22, 2009.

Hon. ROBERT E. ANDREWS, *Chairman,*
Health, Employment, Labor and Pensions Subcommittee, Committee on Education and Labor, U.S. House of Representatives, Washington, DC.

DEAR CHAIRMAN ANDREWS: Thank you for your leadership in protecting American workers' savings in section 401(k) plans. I commend you for focusing attention on this important issue by scheduling a hearing on the "401(k) Fair Disclosure for Retirement Security Act of 2009" and I very much look forward to

working with you to formulate the best approach to protecting the hard earned retirement savings of America's workers.

I share your belief that it is essential to provide workers with the information they need to make nformed investment choices and to provide plan fiduciaries with critical information necessary for them to determine that the fees that are charged in connection with their 401(k) plans are reasonable. We want to work with you to provide practical solutions for workers and fiduciaries.

While determining the optimal course will be difficult, our shared commitment to protecting the retirement security of all of America's workers will guide us. Your hearing is an important first step in gathering the information we will need to accomplish our common goal. At the same time, as you know, we are currently reexamining the proposed regulations affecting 401(k) plans developed during the prior Administration to be sure they strike the appropriate balance between protecting workers and requiring greater transparency and accountability from the service providers to 401(k) plans. We look forward to becoming better educated about the issues as this process proceeds and working with you to create a more effective and useful structure for disclosure of 401(k) plan fees.

Again, I appreciate your decision to hold this hearing, and look forward to working with you and the members of the Committee on Education and Labor on issues critical to America's workers.

The Office of Management and Budget has advised that there is no objection to the transmission of this letter from the standpoint of the Administration's program.

Sincerely,

HILDA L. SOLIS, *Secretary,*
U.S. Department of Labor.

Chairman ANDREWS. We are equally honored to have with us the senior Republican member of the full committee, Mr. McKeon, who guided this committee with such grace and skill during his tenure.

Welcome, Mr. McKeon.

Mr. MCKEON. That long, long tenure.

Chairman ANDREWS. All things must come to an end, huh?

Mr. MCKEON. Thank you, Mr. Chairman.

That is what we are hoping.

I thank the gentleman for yielding.

We are here this morning to discuss Chairman Miller's legislation to change the way 401(k) retirement savings plans operate. Much of the focus has been on the bill's requirements for increased reporting and disclosure. So let me start there.

Let me be perfectly clear: Republicans support sensible disclosure to make 401(k) plans more transparent and understandable to workers. We are approaching this issue—with a spirit of openness, and a hope that we can work with the majority to craft a proposal, or with their proposal, as crafted.

Unfortunately, it seems that the drafting process ended before it even began. Instead, we are starting the process with a bill that largely mirrors the proposal that stalled last year, because of legitimate concerns from both sides of the aisle.

I, for one, was not able to support last year's proposal because I saw the potential for harmful, unintended consequences that would limit options for workers. I hope, at the end of the day, with this process, to fix a 0.5 percent, or a 1 percent, or a 1.5 percent fee—we don't end up costing the workers a lot more.

For instance, the bill's requirement that all plans offer an index fund is tantamount to a government seal of approval on a particular investment option. This could inadvertently steer savers in a direction that isn't best for them. The bill also requires the unbundling of services for the purposes of voluminous new reporting; this, despite the fact that experts have told us that unbundling could actually drive up costs for workers—the exact opposite outcome that we are trying to receive.

I hope we can address these issues as the process moves forward. But I think a more open process would have allowed this debate before the legislation was introduced.

I would also like to take a minute to clarify two separate and very serious issues facing America's workers. The fees the workers pay on their 401(k) accounts can significantly impact their long-term savings. Transparency in these fees is a real concern, and one that Republicans share.

But to blame 401(k) fees for the substantial losses workers are seeing in their retirement accounts is to ignore the real culprit, a stock market that has plummeted in the face of a continuing recession.

Again, this is a serious issue, and one that is deeply impacting Americans from all walks of life, whether they are new parents establishing a college fund, or workers preparing for retirement.

Let me say it plainly: The downturn in the stock market should not—it must not—be used as an excuse to enact controversial policies on 401(k) reporting and disclosure. To do so would not only be disingenuous, but it threatens to do a disservice to the very people that we are seeking to help.

401(k) transparency is an important topic in its own right, and one that deserves an honest and realistic debate.

When it comes to the market downturn, unfortunately, solutions will be much harder to come by. But that isn't going to stop us from trying. That is why I am joining other Republicans today to introduce the Savings Recovery Act, a bill that takes important first steps to help Americans begin to rebuild the savings that they have lost.

Our bill gives Americans flexibility and freedom to save, while eliminating penalties that would make it harder to rebuild what has been lost. We will raise the contribution limits on retirement accounts, and we will stabilize pensions with a glide path for recognizing losses, and additional time to boost funding.

We will make it easier for families to save for college, and we will get capital flowing again by temporarily suspending the capital-gains tax on newly acquired assets. And we will allow more Americans to increase their income by doubling the Social Security earnings limit.

The Savings Recovery Act is the product of a Republican solutions group that came together to address the very real concerns of Americans, who have seen their nest eggs evaporate.

We know that savings can't be rebuilt overnight. But that is no excuse to ignore the challenges that families are facing.

As for the bill before us today, the focus is much narrower. Rather than responding to the broader losses in American savings plans, this bill offers a specific prescription for 401(k) reporting requirements and investment options. And, so, recognizing the parameters of the bill, I look forward to a thorough examination of these issues.

Members on both sides of the aisle recognize that Americans need to be able to save for retirement. I hope we can find similar agreement on what steps should be considered to enhance current savings opportunities, rather than stifling them.

Again, thank you for the opportunity to provide a statement. And I yield back.

[The statement of Mr. McKeon follows:]

Prepared Statement of Hon. Howard P. "Buck" McKeon, Senior Republican Member, Committee on Education and Labor

We're here this morning to discuss Chairman Miller's legislation to change the way 401(k) retirement savings plans operate.

Much of the focus has been on the bill's requirements for increased reporting and disclosure, so let me start there, and let me be perfectly clear: Republicans support sensible disclosure to make 401(k)s more transparent and understandable to workers.

We're approaching this issue with a spirit of openness and a hope that we can work with the majority as a proposal is crafted.

Unfortunately, it seems the drafting process has ended before it ever began. Instead, we're starting the process with a bill that largely mirrors the proposal that stalled last year because of legitimate concerns from Members on both sides of the aisle.

I, for one, was not able to support last year's proposal because I saw the potential for harmful unintended consequences that would limit options for workers.

For instance, the bill's requirement that all plans offer an index fund is tantamount to a government seal of approval on a particular investment option. This could inadvertently steer savers in a direction that isn't best for them.

The bill also requires the "unbundling" of services for the purposes of voluminous new reporting. This, despite the fact that experts have told us "unbundling" could actually drive up costs for workers—the exact opposite outcome we're trying to achieve.

I hope we can address these issues as the process moves forward. But I think a more open process would have allowed this debate before the legislation was introduced.

I'd also like to take a minute to clarify two separate and very serious issues facing American workers.

The fees that workers pay on their 401(k) accounts can significantly impact their long-term savings. Transparency in these fees is a real concern, and one that Republicans share.

But to blame 401(k) fees for the substantial losses workers are seeing in their retirement accounts is to ignore the real culprit—a stock market that has plummeted in the face of a continuing recession.

Again, this is a serious issue, and one that is deeply impacting Americans from all walks of life, whether they are new parents establishing a college fund or workers preparing for retirement.

Let me say it plainly: The downturn in the stock market should not—it must not—be used as an excuse to enact controversial policies on 401(k) reporting and disclosure. To do so would not only be disingenuous, but it threatens to do a disservice to the very people we are seeking to help.

401(k) transparency is an important topic in its own right, and one that deserves an honest and realistic debate.

When it comes to the market downturn, unfortunately, solutions will be much harder to come by. But that isn't going to stop us from trying.

That's why I'm joining other Republicans today to introduce the Savings Recovery Act, a bill that takes important first steps to help Americans begin to rebuild the savings they have lost.

Our bill gives Americans flexibility and freedom to save, while eliminating penalties that would make it harder to rebuild what has been lost.

We'll raise contribution limits on retirement accounts, and we'll stabilize pensions with a glide path for recognizing losses and additional time to boost funding.

We'll make it easier for families to save for college, and we'll get capital flowing again by temporarily suspending the capital gains tax on newly acquired assets. And we'll allow more Americans to increase their income by doubling the Social Security earnings limit.

The Savings Recovery Act is the product of a Republican Solutions Group that came together to address the very real concerns of Americans who have seen their nest eggs evaporate. We know that savings can't be rebuilt overnight, but that's no excuse to ignore the challenges that families are facing.

As for the bill before us today, the focus is much narrower. Rather than responding to the broader losses in Americans' savings plans, this bill offers a specific prescription for 401(k) reporting requirements and investment options. And so, recognizing the parameters of the bill, I look forward to a thorough examination of these issues.

Members on both sides of the aisle recognize that Americans need to be able to save for retirement. I hope we can find similar agreement on what steps should be considered to enhance current savings opportunities, rather than stifling them.

Again, thank you for the opportunity to provide a statement. I yield back.

Chairman ANDREWS. Thank you, Mr. McKeon. And we want to proceed with that open-and-honest debate on the 401(k) Fair Disclosure for Retirement Security Act of 2009.

And we have assembled, I think, an excellent group of ladies and gentlemen, to help us do that.

I am going to read the biographies of the witnesses. And then the written testimony of each of you will be accepted, without objection, into the record. And we would ask if each of you would, then, give us a 5-minute oral synopsis of your testimony.

At that time, we will turn to questions from the members of the committee, and try to learn more about what you think.

Mercer Bullard is an associate professor of law at the University of Mississippi School of Law, and founder and president of Fund Democracy, and non-profit advocacy group for mutual-fund shareholders, including 401(k) participants.

Mr. Bullard is returning to the committee. He has a J.D. from the University of Virginia Law School, an M.A. from Georgetown University, and a B.A. from Yale College.

Welcome back, Professor Bullard.

Kristi Mitchem is a managing director, and head of U.S. Defined Contribution Plans for Barclays Global Investors, BGI. Prior to joining BGI, Ms. Mitchem ran the West Coast Derivatives Group, and U.S. transition services for Goldman Sachs.

Ms. Mitchem received her MBA from the Stanford Graduate School of Business, and her B.A. in political science from Davidson College.

Ms. Mitchem, welcome to the committee.

Alison Borland is the strategy leader for Hewitt Consultants Retirement Consulting Business, which administers retirement benefits for more than 11 million participants. She is responsible for studying and developing solutions that improve retirement security for plan participants.

Ms. Borland graduated summa cum laude from Vanderbilt University, with a bachelor's degree in mathematics, and a minor in French. Good combination.

And welcome to the committee.

Julian Onorato is the chairman, CEO and president of ExpertPlan, Inc., which provides retirement-plan solutions and services to employers. Mr. Onorato has 25 years of experience within the financial-services industry, including more than 20 years in retirement-plan services.

Mr. Onorato earned a B.S. in electrical engineering from Drexel University, and has completed an executive program at the Wharton School of the University of Pennsylvania, focused on reengineering the client-service process.

Mr. Onorato, welcome. And you are one of my constituents, and my employer, so it is great to have you with us here today.

Robert Chambers, welcome back.

Mr. Chambers is the former chairman of the Board of the American Benefits Council, an employee-benefits lobbying firm, whose members either employ or administer employee plans. Mr. Chambers also serves as a partner in the McGuire Woods law firm, where he counsels employers in connection with tax-qualified retirement plans.

Mr. Chambers received his B.A. from Princeton University, and his J.D. from the Villanova University School of Law.

Welcome back, Mr. Chambers—good to have you with us.

And, finally, Larry Goldbrum—did I pronounce your name correctly?

Okay. Well, what would it be correctly?

Goldbrum, excuse me—is the executive vice president and general counsel of the Spark Institute, a trade association that represents retirement-plan service providers, including mutual-fund companies, banks, insurance companies, third-party administrators, and benefits consultants.

He received his law degree from the Vanderbilt University School of Law, and a bachelor of business administration degree from the George Washington University.

I know Mr. Kline will be pleased that we have a majority of lawyers on the panel this morning, so we are ready to go.

Mr. Bullard, we would ask you to go first. You have been here before, but I will reiterate for our newcomers, when the yellow light appears, you have a minute or so to wrap up. And when the red light appears, we would ask you to summarize and stop, so we can get on to the questions. Welcome back.

STATEMENT OF MERCER E. BULLARD, FOUNDER, FUND DEMOCRACY AND ASSISTANT PROFESSOR OF LAW, UNIVERSITY OF MISSISSIPPI

Mr. BULLARD. Thank you very much. Thank you Chairman Andrews, Ranking Member Kline, Chairman Miller, and members of the subcommittee, for the opportunity to appear before you today to discuss the 401(k) Fair Disclosure for Retirement Security Act of 2009.

It is an honor and a privilege to appear before you today.

I am testifying, today, on behalf of Fund Democracy, an advocacy group for mutual-fund shareholders that I formed about 9 years ago. But I would be remiss not to mention Barbara Roper, the director of investor protection at the Consumer Federation of America, with whom I have developed the positions that you see in my written testimony, over past testimony and comment letters.

The 401(k) Fee Disclosure Act is—reforms are long overdue. Under current law, figuring out your 401(k) fees is like trying to find a needle in a haystack, except the needle has been broken into three parts, and they have been put into three different haystacks.

The investment-management fees appear in prospectuses. The plan fees appear in something called a Form 5500. And any other account fees that specific to the participant appear in yet another document, their quarterly statement.

The prospectus fees are provided as a percentage of assets. The Form 5500 fees, if any participant could actually find those, are provided as a dollar amount, and not even on a per-account basis. So even if you were able to find all of these fees, you would still have to convert either the prospectus fees, of which there may be 15 or so different options, into dollars, or the 5500 fees, into a percentage based on the entire size of the plan, and then figure out what it would be on a per-participant basis. And then you would have to figure out what appears on your quarterly statement, and figure out that as a percentage of fees.

And then, finally, you would have, for at least one period of time, some idea of what you are paying in 401(k) fees.

If you have any doubt about the absurd patchwork of disclosure requirements under current law, I suggest you visit the Department of Labor's Web site, and review their own brochure, "A Look at 401(k) Fees."

The section that explains how to find out what you are paying in fees would bring tears to the eyes of anyone who has any kind of commitment to fee transparency.

The 401(k) Fee Disclosure Act solves this problem by requiring that all fees be disclosed in one place, in one format. The act is a breath of fresh air in a regulatory environment that continues to be unfriendly to investors.

The SEC recently announced the suspension of reform of 12b-1 fees, and appears to be preparing to lower fiduciary standards for investment advisors. The Department of Labor has proposed rules that effectively protect conflicted investment advice provided to plan participants.

The act's requirement that fee disclosure also appear in participants' statement, which they are actually likely to review, is also a major step forward. It also requires that fees be provided in dollars, in the same place that they will see the value of their accounts in dollars.

For the first time in retail financial-services history, the act will require that fees are provided in a comparative format so that investors can place their fees in context.

Standing alone, fees mean nothing to the fee-insensitive investor. Also, for the first time, the act recognizes the importance of giving participants freedom of choice in deciding whether to invest in a

passively managed fund, or an actively managed fund, that also will, inevitably, impose higher fees.

Actively managed options, as a group, will, by definition, necessarily under-perform the market by the amount of their fees. This means that in the aggregate, active-management fees are a dead weight dragging down overall investment returns for 401(k) plans.

Participants who are required to invest in actively managed funds may significantly outperform the market, but they may also significantly under-perform the market, as many have.

It is unclear how employers can, consistent with their fiduciary duty, force their employees to pay higher fees and assume active-management risk.

The answer may be that financial-services industry has every incentive to steer participants into actively managed funds, which are more profitable than passively managed funds. This is the only way to explain the industry's Orwellian position that offering a passively managed investment option somehow limits choice.

The industry argues that we should be focused on the employer's freedom of choice, not the employees'. But it is the employees' choice and financial security that should be our focus.

The financial-services industry would leave the decision to the employer, and have us ignore the warning issued by the intellectual father of capitalism, Adam Smith, that "Managers of other people's money rarely watch over it with the same anxious vigilance with which they watch over their own. They very easily give themselves a dispensation."

Jack Bogle reminded me of that piece of wisdom, in the "Opinion" section of yesterday's Wall Street Journal.

The employer stock option in 401(k) plans is another example of the incentives of managers of other people's money. Employers have every incentive to create and encourage a captive class of shareholders, as illustrated by the image of Enron executives exhorting their employees to buy more Enron stock.

We offer tax deferral to workers in order to help them pay for retirement. Yet, we then permit the workers to use that tax benefit to gamble 100 percent of their retirement security, not just on the stock of a single company, but on the stock of the company on which they also depend for their income.

I strongly encourage Congress to consider limiting employee's investment in employers' stock to 20 percent of their account balances.

But even without such a provision, the 401(k) Fee Disclosure Act promises to enhance transparency, and promote competition in a way that I am confident will lead to lower fees for America's tens of millions of 401(k) participants.

I am pleased to express my support for the act, and would be happy to answer questions that you might have.

Thank you.

[The statement of Mr. Bullard may be accessed at the following Internet address:]

http://edlabor.house.gov/documents/111/pdf/testimony/20090422MercerBullardTestimony.pdf

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Chairman ANDREWS. Mr. Bullard, thank you very much for your testimony.

Ms. Mitchem, welcome to the committee.

You need to turn your—there you go.

STATEMENT OF KRISTI MITCHEM, MANAGING DIRECTOR, U.S. DEFINED CONTRIBUTION PLANS, BARCLAYS GLOBAL INVESTORS

Ms. MITCHEM. On behalf of Barclays Global Investors, I appreciate the opportunity to testify today, regarding the 401(k) Fair Disclosure for Retirement Security Act of 2009.

Headquartered in San Francisco, BGI is one of the world's largest asset managers. We have approximately $1.5 trillion in assets under management, including hundreds of billions of ERISA plan assets.

BGI services to its clients are focused on investment management. We do not provide other services, such as record-keeping.

Clearly, the events of 2008 were painful for all those investing in retirements. These events have some questioning whether defined-contribution plans can achieve their objective of providing security in retirement for the workers who contribute to them.

Yet, for all the talk of the failures of the system, a closer look at the evolution of 401(k) plans over the past several years revealed significant progress. First, the Pension Protection Act of 2006 included a number of provisions to increase employee participation. And we have seen an increasing number of plan sponsors using these tools.

Second, recent surveys show that despite the equity and market events of the past year, the vast majority of defined-contribution plan participants are sticking with their plans, leaving their money in, and continuing to contribute—evidence that participants understand and value the benefit provided by their defined-contribution plans.

However, the impact of the market turmoil on participant balances has added urgency to the debate on, “What is the optimal design for defined-contribution plans, and how should they be structured to allow these vehicles to achieve their long-term objectives: Retirement Security for millions of Americans.”

Providing plan fiduciaries and plan participants with additional, targeted information about fees and expenses will promote better investment decisions, and help 401(k) plans to better deliver retirement security to the American workforce.

The legislation under discussion today addresses two of the largest issues for D.C. plans: First, for plan sponsors to have sufficient information about the fees and expenses to appropriately discharge their fiduciary responsibility in the selection of providers; and, second, the need for plan participants to have ready access to appropriate, easily understood information about the critical decisions that they need to make regarding investments.

We believe that the appropriate elements of a disclosure regime for plan sponsors must rest on the unique fiduciary considerations

that a plan sponsor encounters in choosing investment funds for the platform.

Through the important and significant costs of providing plan-participant level administration and record-keeping, a plan sponsor must determine how to best provide and pay for these services. In addition, it is most often the case that the workers pay for all of the major costs of the plan: Administration, record-keeping and investment management.

Plan sponsors are, thus, in the position of agreeing to the fees and expenses that workers will fund through deductions from their investment balances in the plan. As such, we believe it is important that plan sponsors receive sufficient information, in sufficient detail, to appropriately discharge their responsibility.

Today, the information that a plan sponsor needs is sometimes difficult to obtain or difficult to compare. There are two reasons for this. First, the myriad of investment alternatives utilized on 401(k) plans, mutual funds, insurance products, bank collective trusts, separately managed accounts—all of these structures have differing compensation mechanisms and differing terminology for what may be the same service.

Second, it can be very difficult to evaluate fees and expenses, when fees for investment management are bundled with fees for administration, record-keeping and related services.

I think we all agree that a worthwhile disclosure regime permits a comparison of like with like. BGI supports legislative efforts to require service providers to provide specific disclosures by fee category, so as to make plan sponsors' decision-making less burdensome.

As to plan participants, the most fundamental decisions that they need to make are whether, and at what level, to participate in the plan; which of the plan investment options to choose; and whether and when to change their investment allocations. These decisions are critical to the future value of their account.

BGI believes that plan participants need information communicated in a way that is easy to understand, and that facilitates a comparison across the full range of designated investment alternatives.

While transparency as to fees and expenses is important for plan participants, any disclosure document needs to present this information in context, as too much focus on fees and expenses could promote a tendency among participants to opt for the lowest-cost option, or to opt out of the plan, to the detriment of their retirement income.

It is worth noting, in conclusion, that in our experience, in the defined-benefit market, asset-management services and administrative services, such as trustee services, are generally disclosed separately. This transparency has contributed to the salutary effect of bringing both investment-management fees and administrative costs down over the last decade.

Increased transparency can, therefore, be an important catalyst for reducing the cost in D.C. plans, and improving the future income of all retirees. Thank you.

[The statement of Ms. Mitchem follows:]

Prepared Statement of Kristi Mitchem, Managing Director, Head of U.S. Defined Contribution, Barclays Global Investors, N.A.

On behalf of Barclays Global Investors (BGI), I appreciate the opportunity to testify today regarding the "401(k) Fair Disclosure for Retirement Security Act of 2009".

Clearly the events of 2008 were painful for all those investing for retirement: global equities fell over 40 percent, and the average 401(k) investor lost approximately 28% of their accumulated balances. These events have some questioning whether defined contribution (DC) plans can achieve their objective of providing security in retirement for the workers who contribute to them. Yet, for all the talk of the failures of the system, a closer look at the evolution of 401(k) and similar plans reveals significant progress over the last several years. First, the Pension Protection Act of 2006 included a number of provisions to increase employee participation, and we have seen an increasing number of employers.using these tools. Second, recent surveys show that despite the equity market events of the past year, the vast majority of DC plan participants are sticking with their plans, leaving their money in and continuing to contribute-evidence that participants understand and value the benefit provided by their DC plan.

However, the impact of the market turmoil on participant balances has added urgency to the debate on what is the optimal design for defined contribution plans, and how should they be structured to allow these vehicles to achieve their long-term objective of retirement security for millions of Americans. Providing plan fiduciaries and individual plan participants with additional targeted information about fees and expenses, which the bill under discussion today will do, will promote better investment decisions and help 401(k) plans to better deliver retirement security for American workers.

Background on BGI

BGI[1] was founded in 1971 as part of Wells Fargo Bank in San Francisco, California. Today, we are owned by Barclays PLC, one of the world's leading diversified financial services companies. We are headquartered in San Francisco with approximately 1600 employees in California and elsewhere in the U.S. and another 1400 worldwide serving the needs of our global clients. BGI is one of the world's largest institutional asset managers, and is the largest provider of structured investment strategies, such as index, tactical asset allocation and quantitative active strategies. BGI pioneered the first institutional index fund strategy in 1971, and has continued a tradition of financial innovation ever since-including the development of target date retirement (lifecycle) funds in the early 1990's.

Overview

BGI is pleased to see the focus of this Committee, the Department of Labor and others on the ways in which services are provided to employee benefit plans and in the way service providers are compensated. Increased complexity has made it more difficult for plan sponsors and other plan fiduciaries to understand what the plan actually pays for specific services and where the potential exists for conflicts. This is particularly so for DC plans, where over the last decade the costs associated with managing and maintaining the plan have increasingly been shifted to plan participants—often through bundled fee arrangements where administration and investment management are offered by the same provider.

Managers of defined benefit (DB) pension plans have well-established tools that allow for savings and investment today in order to deliver retirement benefits for workers far in the future. Using a fully funded DB plan for comparison, we identify four dimensions of comparability for DC plans-contributions, investment quality, portability and lifetime income. Most of our testimony will focus on the second of these-investment quality—which necessarily includes the one of the largest determinating factor in long-term performance—which is fees and expenses.

First, let me briefly address the other dimensions. In a DB plan, contributions are mandated as function of funded status. In a DC plan, it is the participant who must decide if they want to participate, and how much they want to contribute. The Pension Protection Act of 2006-part of the progress in DC plans referenced above-provided plan sponsors with fiduciary protections in establishing auto-enrollment and auto-default savings rates. Data shows plans are adopting auto-enrollment, with the

[1] BGI includes Barclays Global Investors, N.A. and its worldwide asset management affiliates.

number almost doubling from 2005. And, of the top 1000 plans in the United States, over 53 percent now offer auto-enrollment for new employees.[2]

Studies have also shown that people tend to accept the terms of auto-enrollment as given. They are unlikely to opt out, and they are also likely to stay with the default savings rates-now generally set at 3 percent.[3] So inertia is working but it could work even better. Early results from researchers in the behavioral finance field indicate that even if you take the default savings rate up to 6, 7, 8 or 9 percent, you won't see a meaningful number of participants opting out. So, although we don't have the level of funding that's required to support retirement adequacy today, we can get there by encouraging more and more plan sponsors to automatically enroll participants and by creating further incentives for employers to increase the default saving rate to 6 percent and higher. Another dimension of pension investing is portability, arguably the one area where DC plans outpace DB plans. Unlike the traditional DB plan where unvested balances are typically lost when an employee leaves, the DC plan system explicitedly recognizes the more transient nature of today's worker, where contributions actually follow an employee. The DC portability feature is not without its flaws. Moving balances from one employer to the next is difficult and requires a participant to take action. And we know that if exiting employees take a cash distribution, a significant amount of those funds leak out of the retirement system.

Another comparable to DB plans is lifetime income. Every DB plan offers the opportunity for participants to choose income for life. But this critical component has yet to have been addressed in a meaningful way in the 401(k) system today. Important as it is to accumulate sufficient assets during a participants working years, it is also as important to have a strategy to fund consumption in retirement. Many financial services providers, including BGI, are engaged in designing products for the DC market to manage the twin risks of inflation and longevity. These products take two principal forms: guaranteed minimum payments for set periods and annuities. The market turmoil in 2008 has increased the interest of both plan sponsors and plan participants in these products.

Now, moving closer to the subject of today's hearing, is the dimension of investment quality. DB plans tend to be well diversified, use institutional-quality managers and rebalance on a regular basis back to a strategic asset allocation. To mimic this in a 401(k) world, ideally the majority of plan participants would be invested in autorebalancing strategies that are constructed with institutional quality funds. Clearly these allocations would need to be age appropriate, provide acceptable outcomes across a range of different market environments, and be priced at levels that reflect the bulk buying power of 401(k) plan sponsors.

More DC plans today offer pre-mixed portfolios that are well diversified and autorebalancing than ever before.[4] And again, the PPA has moved things in the right direction, by providing a level of fiduciary relief for plan sponsors to default participants into just these types of investments. Congress should also consider changes that would allow employers to diversify participants out of heavy concentrations of company stock as they near retirement. The legislation under discussion today addresses two of the largest issues for DC plans: first, for plan sponsors to have sufficient information about fees and expenses to discharge their fiduciary responsibilities in the selection of service providers. And second, the need for plan participants to have ready access to appropriate, easily understood information about critical issues that affect their investment decisions.

Elements of a Disclosure Regime for Plan Sponsors

We believe the appropriate elements of a disclosure regime for plan sponsors must rest on the unique fiduciary considerations that a plan sponsor encounters in establishing designated investment alternatives under a DC plan and in choosing investment funds for the plans. Due to the importance and significant cost of providing plan participant level administration and recordkeeping, a plan sponsor must determine how best to provide and pay for these services. Recordkeeping expense is often-but need not be-funded on a "bundled" basis through the expenses charged against assets held by the investment funds in which the plan invests and/or through fees received by the investment manager. In addition, it is more often the case that plan participants fund all the major costs of the plan (administration, recordkeeping and investment management). Plan sponsors are thus often in the posi-

[2] Hewitt Associates "Trends and Experience in 401(k) Plans 2007".

[3] The Importance of Default Options for Retirement Saving Outcomes: Evidence from the United States. Beshears, Choi, Laibson, Madrian (2007).

[4] Cerruli, Retirement Markets 2007; Hewitt Associates "Trends and Experience in 401(k) Plans 2007.

tion of agreeing to the fees and expenses that participants will fund through direct or indirect deductions from their investment balances in the plan. As such, we believe it is important that plan sponsors receive sufficient information, in sufficient detail, to appropriately discharge this responsibility. Today, the information the plan sponsor needs is sometimes difficult to obtain or difficult to compare. There are two reasons for this. First, the myriad investment alternatives (mutual funds, insurance products, bank collective trusts, separately managed accounts) have differing compensation mechanisms and differing terminology for what may be the same service. Second, it can be more difficult to evaluate fees and expenses when fees for investment management are bundled with fees for administrative, recordkeeping and related services.

It is not enough for plan sponsors and other plan fiduciaries to understand what fees and expenses are explicitly deducted from a participant's account or paid directly from plan assets or by the plan sponsor from its own funds. To fully evaluate potential investment options and service providers, and their appropriateness for its plan, plan sponsors must understand fully how each service provider is compensated, both directly and indirectly.[5] BGI supports legislative efforts to require service providers to provide specific disclosures, by fee category, so as to make plan sponsors' decision-making less burdensome.

A worthwhile disclosure regime permits a comparison of "like with like". The challenges faced by plan fiduciaries in making decisions among service providers for the same services is compounded by the inability to make comparisons. For example, a plan sponsor who is evaluating a proposal from (a) a bundled provider who offers a full range of affiliated investment options, (b) a proposal from an independent recordkeeper whose platform can accommodate most any investment option available in the DC market, and (c) a proposal from a bundled provider who permits the plan fiduciary to add unaffiliated investment options but is generally priced for a plan using affiliated investment options, will find it difficult to make effective comparison of relative costs. In the first proposal, the sponsor cannot determine the fee for plan level administration/recordkeeping, in the second the cost of administration and investment are separate and thus transparent, and in the third, the mix of investment options drives the overall cost to the plan and its participants but without knowledge of the underlying fees in administration/recordkeeping, the plan fiduciary may be unable to determine if any particular affiliated investment option is appropriately priced.

Bundled service arrangements may be appropriate for some plans, particularly smaller ones.[6] This is only appropriate if the fee components of both recordkeeping and asset management are separately and clearly disclosed. Clear, comparable and fully disclosed information about compensation will allow the plan sponsor to more easily and adequately meet its fiduciary responsibility under ERISA to determine that the fees and expenses are reasonable.

It is worth noting that in our experience in the defined benefit market, asset management services and administrative services, such as trustee services, are generally disclosed separately. This transparency has contributed to the salutary effect of bringing both the investment management fees and administration costs down over the last decade.

Elements of a Disclosure Regime for Plan Participants

The appropriate elements for a disclosure regime for plan participants must be grounded in an understanding of the two levels of investment decision being made

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[5] The Department of Labor proposed service provider exemption under Section 408(b) (2) [citation] also seeks to provide plan sponsors with information necessary for the sponsor to determine that a contract or arrangement is reasonable. (See, Reasonable Contract or Arrangement Under Section 408 (b)(2)-Fee Disclosure 72 FR 70988). However, as proposed, service providers offering a bundle of services generally are not required to break down the aggregate compensation or fees among the individual services comprising the bundle, with two exceptions—if separate fees are charged against a plan's investment and reflected in the net asset value, and if compensation or fees are set on a transaction basis (even if paid from mutual fund management or similar fees). Further, we note that the mutual fund industry has questioned whether the Department's proposed regulation can require investment advisors to mutual funds to make disclosures to plan fiduciaries as contemplated under the proposal-even though these investment managers receive the major portion of plan fees if the plan sponsor chooses mutual funds as the designated investment alternative. See, Testimony of Paul Schott Stevens, President and CEO, Investment Company Institute, Department of Labor Hearing on 408 (b)(2) Proposal (April 1, 2008). The legislation under discussion today addresses these deficiencies.

[6] Bundled services may provide the lowest cost alternative for small plans. It is not the bundling of services together that is of concern, but rather the plan fiduciary's need to be able to compare the costs of certain services as between potential service providers and in myriad configurations.

in DC plans. The first, made by plan fiduciaries, is to decide what investment choices to make available to plan participants from the enormous array of potential investments and the second, the decision by plan participants regarding how to direct their funds among the options selected by the plan sponsor. The information necessary for a plan fiduciary to determine what investment options to offer (and which service providers to retain) differs from the information which plan participants need when choosing an appropriate investment from amongst those investment options.

The most fundamental decisions that plan participants need to make are whether, and at what level, to participate in the plan; which investment options to choose; and whether and when to change their investment allocations. These decisions are critical to the future value of the account. Participants' decision making is influenced by many considerations including basic behavioral finance factors.

BGI believes that participants need information communicated in a way that is easy to understand and facilitates comparison across the full range of designated investment alternatives, including automated asset allocation funds (i.e., target date funds and managed accounts). Funds should be organized around risk level, rather than by asset class, as participants do not necessarily understand asset class designations, but do understand risk levels such as "conservative", "moderate", "moderate aggressive" and "aggressive". There should be a separate section called "premixed asset allocation products" for multi-asset class investments and indicate the the risk level is either static or a function of the investment horizon. This approach provides two benefits: it provides basic risk information without the necessity for a plan participant to review another document and eliminates the category of "other" which otherwise would include all designated investment alternatives that are not stock or bond funds.[7] A fund description should be provided that communicates the investment objective succinctly and in 'plain English'. We don't believe the mere identification of the management style of the fund as being 'passive' or 'active' provides useful information to most participants, who would not be familiar with this terminology. We note that unless asset based fees for administration/recordkeeping are disaggregated from management fees, the distinction between passive and active is not very meaningful-participants need to understand how much excess return ('alpha') they should be expecting vis-a-vis the fee to be paid. If certain investment options carry more administrative/recordkeeping fees than others (which is not uncommon), plan participants need to understand that higher fees are not necessarily due to high excess return expectations.

Behavioral finance research shows that when confronted with too much information, or information that is not organized to be customer friendly, participants fail to participate or engage in decisions about their investment allocation. While transparency as to fees and expenses is important for plan participants, any disclosure document also needs to present this information in context, as too much focus on fees and expenses could promote a tendency among participants to opt for the lowest cost option, (most likely to be a money market fund or company stock) to the detriment of their retirement income. Failure to adequately diversify investments is one of the more common errors made by plan participants.

A number of plans provide multiple investment options within the same general strategy (for example, several large cap domestic equity funds). When a plan does so, behavioral finance research suggests that plan participants would also benefit if the alternatives within the same strategy were either ranked by cost or the least cost alternative were highlighted in someway.

Other

The bill also proposes that all DC plans provide an investment option that is an unmanaged or passively managed fund meeting certain criteria as to its securities portfolio and investment objectives (including the likelihood of meeting retirement income needs if funded at adequate levels. We believe one of the advantages of ERISA is that it permits plan sponsors and plan fiduciaries to make their own prudent decisions about what investments are appropriate for their plan participants and beneficiaries. However, the Committee may wish to consider the approach taken by the Federal Employee Retirement Security Act of 1986 (FERSA) which established the Federal Thrift Savings Plan. As amended, FERSA includes six categories of investment options, with a focus on index strategies across the investment spectrum (equity and fixed income) as well as lifecycle funds. While many plan sponsors

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[7] Company stock, an investment option in a number of DC plans, will need to be addressed separately due to the particular nature of this investment option as compared to other investment strategies.

do provide passive investment options in their plans, this Committee should consider how to further encourage this trend.

Conclusion

Achieving financial security in retirement is a significant challenge for most Americans. Currently, many DC plans have challenges with three of the four major dimensions of retirement security: the contribution, or savings, component; the investment quality component; and the retirement distribution component. By promoting more effective disclosure of fees and expenses to plan sponsors and plan participants, the 401(k) Fair Disclosure for Retirement Security Act of 2009 would improve the second component. Increased transparency can be an important catalyst for making DC plans performs more like DB plans in the balance of costs and investment performance and thereby improving the future income of all retirees.

Additional Background on BGI

At December 31, 2008, BGI managed over $1.5 trillion, of which approximately $200 billion represents defined contribution plan assets. For both its defined contribution and defined benefit plan clients, BGI acts solely as an investment manager. Neither BGI nor any of its affiliates currently act as master trustee or provide recordkeeping services. It does act as a collective fund trustee and as a named custodian with custody operations, fund accounting and related services provided by third parties. Since its founding, BGI has remained true to a single global investment philosophy, which we call Total Performance Management. BGI manages performance through the core disciplines of risk, return, and cost management. The success of our indexing methodology results from our focus on delivering superior investment returns over time while minimizing trading and other implementation costs and rigorously controlling investment and operational risks. It has been the foundation for the way we've managed money for over 30 years and we believed it has served our clients very well. BGI's clients are "institutional", by which we mean defined benefit and defined contribution pension plans sponsored by corporations or public agencies, and endowments, foundations and other similar pools of capital. BGI's services to its clients are completely focused on investment management; we do not provide other services, such as recordkeeping. Among those institutions we have been honored to serve is the Federal Thrift Savings Plan (TSP). BGI was first appointed a manager for the TSP in 1988, and we have successfully retained and grown this relationship in regular, highly competitive bidding processes since that time.

Chairman ANDREWS. Thank you very much, Ms. Mitchem.

Ms. Borland, welcome. We look forward to your testimony.

STATEMENT OF ALISON T. BORLAND, RETIREMENT STRATEGY LEADER, HEWITT ASSOCIATES, LLC

Ms. BORLAND. Thank you.

Chairman Andrews, Chairman Miller, Ranking Member Kline, and members of the subcommittee, I am honored to be here today, representing Hewitt Associates, to discus our support of the 401(k) Fair Disclosure for Retirement Security Act of 2009.

We have a unique perspective, as the largest independent provider of retirement-plan administration services, serving more than 11 million retirement-plan participants. We are not affiliated with any investment-management firm.

Now, more than ever, employees need to accumulate the greatest retirement savings possible for every dollar saved. Our experience shows that increased fee transparency leads to lower fees. Because the vast majority of these fees are paid by participants, lower fees lead to higher retirement benefits for participants.

Plan fiduciaries cannot fulfill their obligations without clear fee disclosures from service providers that break out fee details for various services—most importantly, investment-management and administration fees, which, together comprise more than 90 percent of total fees in 401(k) plans.

This breakout of these fees, for these services, on a consistent basis, enables ready comparisons of various service providers and their structures, so that fiduciaries can make the best decisions, based on complete information.

In addition to evaluating the fees and their reasonableness, at the time of the initial contract, fiduciaries need to evaluate them on an ongoing basis. Only by understanding administrative fees separately from asset-based fees, do plan fiduciaries have the information needed to effectively understand how these fees could fluctuate over time, and deem those changes reasonable.

The best way to illustrate the importance of transparency is through an example. Hewitt recently worked with a client that wanted to evaluate combining the services for two separate large 401(k) plans. Administration fees had not been broken out for one of the plans in the past. The impact of this was clear: One plan was charged $50 per participant for administration, while the second plan was charged more than $100 for administration, even though the second plan was significantly larger.

Unbundling the administrative fees from the investment-management fees provided the company with the ability to look closely at the investment choices offered in their plan, based on their own merit, and also evaluate the administration services in greater depth. This resulted in a selection of lower-priced, non-mutual-fund vehicles, as well as a significant reduction in the administrative fees.

The combined fee structure across both plans decreased by nearly half. Administrative fees were reduced to just over $40 per participant. Total fees decreased by about $7 million, all of it directly accruing to plan-participant accounts. This is just one example of a scenario we see on a regular basis.

The end result may or may not result in the actual unbundling of services. But the unbundled transparency almost always leads to lower prices and, therefore, increased benefits to plan participants.

Second, I would like to say a few words about the need for disclosure of additional revenue sources and conflicts of interest. Service providers often generate revenue streams by providing services to 401(k) plan participants that are unrelated to the 401(k) plan, like offering retail IRA rollovers, or other financial products.

It is critical that all sources of revenue generated as a result of the 401(k) relationship are disclosed, so that the plan sponsor can identify and manage conflicts of interest that may affect plan participants.

The third issue I would like to address is participant fee disclosure. We believe that comprehensive information should be readily and easily accessible to participants. Mandatory disclosures should help participants understand fees on their account balances, as well as provide other important information to facilitate investment decisions, such as risk level and the importance of diversification.

We have to acknowledge that many participants lack the basic financial acumen to understand these issues. But unbiased investment advice, education and certain plan-design features can make a difference there.

In summary, we support Chairman Miller's bill because it is, quite simply—its provisions enhance the retirement security of

Americans through much-needed clarification on the level of disclosure required. The bill does not allow service-provider exemptions that get in the way of full transparency.

Knowledge is power. And by arming plan sponsors with complete, consistent and comparable information, they will be better equipped to negotiate and provide high-quality plans for their participants at reasonable costs. Hewitt would be pleased to offer our data analysis, our experience, and our consulting and administration expertise to help the subcommittee complete its work on this issue. Thank you.

[The statement of Ms. Borland follows:]

Statement of Alison Borland, Retirement Strategy Leader, Hewitt Associates, LLC

Mr. Chairman and Members of the Subcommittee: Thank you for the opportunity to testify at this important hearing on 401(k) Fair Disclosure for Retirement Security Act of 2009. My name is Alison Borland, and I am the Retirement Strategy Leader for Hewitt Associates. As requested, I will focus my remarks today on the experience of mid- to large-sized employers in their role as 401(k) plan fiduciaries.

Hewitt Associates is a global human resources outsourcing and consulting company providing services to major employers in more than 30 countries. We employ 23,000 associates worldwide. Headquartered in Lincolnshire, Illinois, we serve more than 2,000 U.S. employers from offices in 30 states, including many of the states represented by the members of this distinguished Subcommittee.

As one of the world's premier human resources services companies, Hewitt Associates has extensive experience in both designing and administering 401(k) plans for mid- to large-sized employers, including helping employers to communicate with their participants about this increasingly important benefit. We are the largest independent provider of administration services for retirement plans, serving more than 11 million plan participants. We do not manage funds and have no affiliations with any investment management firms.

The focus of our testimony today is to make a case for much greater transparency in the disclosure of fees by service providers to plan fiduciaries, a position that we believe Chairman Miller's bill addresses well. Now more than ever, employees need to accumulate the greatest retirement savings possible for every dollar saved. Our experience shows that increased fee transparency increases fiduciaries' understanding and their negotiating power, ultimately leading to lower fees and higher retirement benefits for participants. We will provide several real-world examples that illustrate how full transparency can benefit both fiduciaries and participants. We will also discuss the need for full disclosure of potential conflicts of interest by service providers, the advantages of providing mandatory fee disclosure to plan participants and the need for unbiased investment advice and financial education to help participants adequately prepare for retirement.

Plan Fiduciaries Must Understand All Fees

As the Subcommittee is well aware, 401(k) plans play a vital role in retirement income security for the majority of Americans. In a recent Hewitt survey, 65 percent of the 302 employers surveyed indicated that 401(k) plans were the primary retirement vehicle for their workforce.[1] This dependence, coupled with the negative impact of the economic downturn on 401(k) account balances, gives even greater urgency to taking the necessary steps to prepare employees to be financially secure when it comes time to retire.

Since most plan fees are paid by participants out of their accounts, these fees can significantly affect the overall income that plan participants earn and, consequently, affect their overall retirement security. To protect the interests of their participants and beneficiaries, plan fiduciaries must increasingly act as experts in plan fee arrangements.

Plan fiduciaries need a complete understanding of all fees under a contract to ensure that the charges constitute reasonable compensation. This is necessary before any contract can be covered by the prohibited transaction exemption under section 408(b)(2) of ERISA. Equally as important, understanding plan costs is necessary for fiduciaries to act prudently and solely in the interest of plan participants and beneficiaries when selecting a service provider, as required by section 404(a) of ERISA.

Plan fiduciaries cannot fulfill their obligations without clear and concise fee disclosures from service providers. Further, these fees must be disclosed in a manner that

allows for ready and consistent comparisons. Without a uniform basis of disclosure, plan fiduciaries cannot make the best decisions. The disclosures required under current law are both unclear and insufficient, and the 2008 Department of Labor's proposed regulations on 408(b)(2) also fall short.

Service Providers Must Fully Disclose Fee Details

To fully meet their obligations, fiduciaries must understand the most significant fee components of their plans and the services covered by these costs. A recent study highlighted that there is significant variation in how fees are charged for defined contribution plan services.[2] Uniform disclosure rules that permit meaningful fee comparisons will help fiduciaries better evaluate the costs of services among competing service providers, even when different packaging and pricing methods are used. It is especially important that plan sponsors understand the embedded cost of services that a service provider may wrap into a single price and represent as "free." In addition to evaluating fees at the time of contract signing, fiduciaries need to consider the impact of fees on an ongoing basis to understand how they may change over time. Full disclosure by service providers is essential if plan fiduciaries are to act in the best interest of plan participants.

Breaking Out Fees Increases Knowledge and Negotiating Power

Typical plans have investment management, administrative, trustee, and other miscellaneous fees.

Investment management and administrative fees generally account for more than 90 percent of individual account plan costs. Investment management fees are based on the value of the assets. Administrative fees include costs for recordkeeping, communication, compliance, and education, which are generally based on the number of participants served by the plan. Rather than charge a separate fee based on the number of participants in the plan, many providers who manage funds in addition to providing administration services will embed the administrative fees within the asset based fees that also cover investment management. By obtaining a breakout of these administrative fees from the asset-based fees, fiduciaries gain improved negotiating power by having the information needed to more effectively model how these fees may fluctuate over time with changing asset values and participant size. More details about the two primary sources of fees in 401(k) plans and the importance of separating them are described below.

Investment Management Costs

Investment management expenses are the largest plan cost, making up approximately three-quarters of total plan fees. These fees are reflected in the expense ratios of the funds represented in the plan.

Research has proven that fees are a critical—if not the most important—factor when selecting funds. In fact, studies have shown that lower-cost funds consistently and substantially outpace higher-cost funds over time.[3] Understanding a fund's investment costs helps plan fiduciaries select investment alternatives with strong relative historical returns and the lowest possible fees. For instance, 401(k) plans for mid- to large-sized employers with substantial assets might secure a tiered fee schedule that guarantees a decrease in expense ratios as the assets grow. This is accomplished by using fund vehicles available only to institutional investors, such as separate accounts and collective trusts. These fund vehicles have been common in defined benefit plans and are gaining popularity in 401(k) plans because of the clear cost advantages.

Administrative Costs

Administrative costs are the second largest source of fees in 401(k) plans. On average, administrative fees represent an additional 20 percent of total plan fees. These fees are often embedded within the expense ratio of the mutual funds within the plan. If a plan sponsor does not understand that it is paying administrative fees through the investment management fees, it may believe administration services are "free." This might lead the plan sponsor to inadvertently choose investment options or administrative services that do not maximize participant savings.

According to Hewitt survey data, 75 percent of plans require plan participants to pay some or all fees associated with administrative services.[4] Unlike investment management costs, which logically vary based on the amount of assets in the plan, the actual cost of administrative services is more dependent on the number of participants served. Because many service providers charge administrative fees as a percentage of assets embedded within the investment management fee, administrative fees fluctuate as plan asset values change over time. Under normal market conditions, this means that the administrative fees will often increase over time, even if participant counts remain the same. This practice is most common with bundled

providers that combine investment management services and administrative services in one bundled price.

There is no reasonable explanation why administrative costs should fluctuate based on asset size. If administrative fees are broken out separately from investment management fees and understood in dollars per participant (even if charged in basis points), responsible fiduciaries will have the ability to accurately compare all plan fees and make the optimal investment and administrative choices. Scrutiny of the initial contract is a necessity, but periodic review over the life of the contract is also very important to ensure fees remain reasonable.

Real-World Examples of the Benefits of Uniform and Detailed Fee Comparisons

In our work with large employers, Hewitt finds that detailed and uniform fee comparisons across different types of service providers often results in lower negotiated fees. Armed with disclosure of fee components, the plan fiduciary can consider alternate providers, evaluate lower-cost fund options, and/or negotiate lower fees with the current provider. Lower fees directly benefit plan participants by increasing their account balances and compounding this savings throughout their working years. Several real-life examples illustrate the point.

Company X Company X wanted to evaluate the benefits of combining the two separate 401(k) plans it sponsored through two different service providers. The combined plans had nearly $5 billion in assets and served 45,000 participants. Total fees for the plans were 0.30 percent, with embedded administrative fees of just over $50 per participant for one plan to more than $100 per participant for the second plan, with an average of $85 per participant. Administrative fees had not been broken out for the more expensive plan in the past, explaining the wide differential in per participant fees.

Consolidating the two plans, including investment options and administration services, created significant savings on investment management and administrative costs. Further, unbundling the administrative fees from the investment management fees provided the company with the ability to look more closely at the investment choices and evaluate the administration services in greater depth. This resulted in the selection of institutional funds (non-mutual fund vehicles) and a significant reduction in administrative costs through the negotiation of per participant fees. The combined fee structure across both plans dropped by nearly one-half to only 0.16 percent, including administrative fees of just over $40 per participant.

The approximately $2 million of annual savings in administrative fees accrued directly and entirely to participants. Total fees decreased nearly $7 million per year.

Company Y Company Y sponsored a plan using a bundled fee structure with total fees of 0.63 percent of plan assets, which included an estimated $242 per participant in embedded administrative charges. The firm had 3,000 participants and $250 million in assets. Although satisfied with the services, as a responsible fiduciary, Company Y hired a consultant to help them better understand their fees and fee structure. Following the analysis, Company Y was able to negotiate with their same service provider for a drop in total fees from 0.63 percent to 0.46 percent, with a reduction of administrative fees from $242 per participant to $155 per participant. Further, Company Y negotiated additional services for participants as part of the same administrative fee structure. All $290,000 of annual savings accrued entirely to participants.

Company Z Company Z used a bundled provider for a plan that was predominantly invested in mutual funds. The firm had over 50,000 participants and in excess of $4 billion in assets. Total fees were just over 0.50 percent, with embedded administrative fees estimated at nearly $100 per participant. After disclosing and evaluating the fee structure, the current service provider offered to substantially reduce fees and offered alternative institutional (non-mutual fund) products. With this new opportunity, fees could decline to approximately 0.30 percent, with estimated administrative fees reduced to just under $50 per participant. Plan participants would realize the annual savings on administrative fees of nearly $4 million per year. In addition, under the new fee structure, as assets grow over time, participants' savings will grow.

BEFORE AND AFTER PRICING SUMMARY FOR REAL–WORLD EXAMPLES

Example	Assets	Participant count	Total fees before	Total fees after	Admin/trustee fees before	Admin/trustee fees after
Company X	$5B	45,000	0.30%	0.16%	$85/ppt	Just over $50 per participant 15% to 60% reduction **Over $2 million in annual savings**
Company Y	$250M	3,000	0.63%	0.46%	$242/ppt	$155 per participant 36% reduction **$290,000 in annual savings**
Company Z	>$4B	>50,000	0.50%	0.30%	$100/ppt	Less than $50 per participant More than a 50% reduction **Nearly $4 million in annual savings**

The resulting savings in these examples were possible once plan sponsors understood that a significant portion of plan costs was not dependent on asset size but rather on number of participants. This allowed them to quantify the fees on that basis. When all costs are bundled into an aggregate asset-based fee, fiduciaries must be able to model how fees will change over time and how reasonable they are when considering changes in asset size and participant counts.

Plan Sponsors Need Unbiased Information About Revenue Sources

Service providers often generate revenue streams by providing services to 401(k) plan participants that are unrelated to the 401(k) plan. It is critical that all potential sources of revenue generated from servicing the plan are disclosed so that the plan sponsor can identify and control conflicts of interest that may affect plan participants.

A useful example is when a 401(k) service provider offers participants the ability to roll over their 401(k) account balances into the provider's own retail individual retirement accounts (IRAs) upon termination of employment. Many administrative providers actively market their IRA solution, because encouraging these rollovers can lead to very lucrative add-on revenue. So in essence, some providers may do the administration work on a 401(k) plan with the ultimate goal of obtaining a high percentage of participant rollovers at termination or retirement, given that high dollar balances, along with the often higher investment fees in an IRA environment, are generally more profitable than providing the 401(k) services.

These cross-selling practices may be detrimental to participant retirement security. Hewitt's research shows that it is usually better from a cost perspective to either leave the accounts in the existing mid- to large-sized 401(k) plan, or to move those funds into another mid- to large-sized employer sponsored 401(k) plan if available through a new employer. The marketing of rollover products often does not adequately explain the trade-offs and potential benefits between alternatives. In addition, the provider servicing the 401(k) plan may not have the best IRA solution or pricing. Participants may be encouraged to use a sub-optimal product when it is promoted in conjunction with plan services, believing the employer has selected the provider through the fiduciary process.

Consider an example of a participant with access to a 401(k) plan with institutionally priced investment options. Using conservative assumptions and typical account balances, our modeling shows that a 35-year-old who is an average saver and moves her $33,000 balance from her company plan to a retail IRA could lose $37,681, or 9 percent (or more), compared to what she would have if she remains invested in the 401(k) plan until she receives required distributions at age 70½. If she is an active saver who contributes 8 percent per year over the course of her career and then moves her $101,808 balance to an IRA at age 35, she could lose $116,250 or more. If we consider the greater fee savings she typically would experience in a large 401(k) plan, the IRA loss increases to $244,078, representing a loss of 18 percent of the total accumulated balance.[5] Plan sponsors must understand the incentives that may exist for service providers to encourage participant behaviors that may not be in their best interest because they do not contribute to greater retirement security. Service providers may directly market products like retail IRAs, other retail investment products, or life insurance products to this captive audience. Plan fiduciaries need to understand how these potential revenue streams may affect services received and administrative fees paid. They also need to carefully consider the potential consequences for participants. Identifying these potential conflicts of interest requires more detailed disclosure than is available today.

Participants Need Better Fee Disclosure

Plan participants will also benefit from improved disclosure of fees. While Hewitt believes that comprehensive fee information should be readily accessible when requested, mandatory disclosures should be concise and provide information that is truly meaningful for the vast majority of participants. Fee disclosures to participants must be understandable without overloading the average participant with so much technical detail that the information is likely to be ignored or discarded. The worst-case scenario is that the disclosure actually discourages savings.

Plan participants' needs for expense disclosure are very different from their employers' (or other plan fiduciaries) requirements. Before participants choose to contribute to the plan, the plan fiduciary has already selected service providers and investment funds for the plan. This means that most plan costs are determined before the participant is ever involved; thus the importance of full fee transparency for plan fiduciaries. It is also the plan fiduciary, and not the participant, that must regularly monitor and evaluate service providers, including investment managers and administrators. Service provider fee disclosure is of primary importance to enable plan fiduciaries to keep plan costs low and maximize retirement income for participants.

Hewitt believes that participants should be informed if and how administrative fees are paid by the plan, regardless of how fees are charged, whether bundled or unbundled. As with disclosures to plan fiduciaries, fee disclosures from all service providers to plan participants should be available on a uniform basis to allow for meaningful comparisons.

Mandatory disclosure to plan participants should aid them in understanding fees on their account balances, but not confuse their decision making or overwhelm them with information they cannot control. For example, if participants simply move their portfolios toward the lowest-cost funds solely based on the fee information provided, this may decrease their retirement readiness. Many participants do not have the basic financial acumen to understand the importance of diversifying their portfolio and changing that asset allocation over time based on their changing personal circumstances. Greater disclosure will not solve these critical awareness issues. This is when investment advice, education, and certain plan design features can make a real difference.[6] Objective advice can aid participants in maximizing their investment returns and achieving a level of risk that is acceptable to the individual participants, given their unique circumstances. However, the regulatory oversight provided in the DOL investment advice regulations currently under review is not sufficient. Unlike fee disclosure to plan fiduciaries, greater disclosure under the investment advice rules without greater regulatory scrutiny may not do enough to protect plan participants. Hewitt believes that all but the most sophisticated plan participants could benefit from more investment advice and that unbiased investment advice should be readily available.

The 401(k) Fair Disclosure for Retirement Security Act of 2009 Can Help

Hewitt supports Chairman Miller's bill because its provisions enhance the retirement security of Americans. The bill addresses the key disclosure gaps from both a plan sponsor and a plan participant perspective and does not allow service provider exemptions that get in the way of full transparency.

Full Fee Disclosure

The 401(k) Disclosure for Retirement Security Act of 2009 would require service providers to break out total costs into the main fee categories: investment management, administrative/recordkeeping, transactional, and other. The bill would also require disclosure of all fees paid to affiliates and subcontractors in a bundled fee arrangement. This will allow plan sponsors to readily compare the services of different types of providers in a uniform manner leading to better control and management of fees. By comparison, the Department of Labor's 2008 proposed service provider fee regulations permit bundled providers to report all fee types in the aggregate. Under the proposed regulations, fiduciaries would not be able to uniformly evaluate services offered by different providers, severely impairing their ability to negotiate lower fees for plan participants.

Potential Conflicts of Interest

The 401(k) Disclosure for Retirement Security Act of 2009 would also requires disclosure of any material personal, business, or financial relationship with the plan sponsor, plan, or other service provider (or affiliate) that benefits the service provider. The service provider must also disclose the extent to which it uses its own proprietary investment products. These provisions would go far to arm plan spon-

sors with the information they need to identify any potential conflicts of interest that could disadvantage their plan participants over time.

Meaningful Participant Disclosures

The 401(k) Disclosure for Retirement Security Act of 2009 would provide for uniform and transparent disclosure of fees to participants, regardless of how plan services are provided (e.g., bundled or unbundled). This is a good starting point, although we believe that the mechanics of participant fee disclosure merit further review and discussion. On the other hand, the proposed DOL regulations on participant fee disclosure appear to treat disclosure very differently, depending on how plan services are packaged. Under these rules, it is quite likely that plan participants in a plan with bundled services may never realize that they are paying for plan administration or how much. In contrast, plans with independent plan recordkeepers would be required to provide a special quarterly disclosure of administrative fees. Such different disclosure standards are inconsistent, misleading, and lack the transparency that participants deserve and increasingly demand.

Conclusion

In closing, Mr. Chairman and Members of the Subcommittee, Hewitt believes that complete fee transparency is a key factor in maintaining a strong defined contribution retirement plan system.

Knowledge is power, and by arming plan sponsors with complete and comparable information, they will be better equipped to negotiate and provide high-quality plans for their participants at reasonable costs. The current economic and financial environment makes it even more important to provide uniform fee transparency in 2009. Hewitt would be pleased to offer our data analysis, our experience, and our consulting and administration expertise in helping the Committee complete its work on this issue.

Thank you.

ENDNOTES

[1] Hewitt Associates, Trends and Experience in 401(k) Plans (2007)

[2] Deloitte, Defined Contribution 401(k) Fee Study (Spring 2009), conducted for the Investment Company Institute

[3] For example, Christine Benz, director of personal finance at Morningstar Inc., stated that "In almost every study we've run, expenses show up as a very significant predictor of future performance." In other words, lower costs are an indicator of high performance. *http://online.wsj.com/article/SB122099798601116727.html?mod=googlenews—wsj;* See also, Haslam, John, Baker, H. Kent, and Smith, David M., Performance and Characteristics of Actively Managed Retail Mutual Funds with Diverse Expense Ratios, Financial Services Review, Vol. 17, No. 1, 2008 *http://papers.ssrn.com/sol3/papers.cfm?abstract—id=1155776*

[4] Hewitt Associates, Trends and Experience in 401(k) Plans (2007)

[5] Hewitt's Statement for the Record to the U.S. Senate Special Committee on Aging Hearing on "Saving Smartly for Retirement: Are Americans Being Encouraged to Break Open the Piggy Bank," July 16, 2008

[6] Hewitt Associates, Building the Ideal 401(k) Plan: Providing Optimal Accumulation and Effective Distribution (October 2008)

Chairman ANDREWS. Ms. Borland, thank you for your contribution to this debate, and to our committee's consideration.

Mr. Onorato, welcome. It is nice to have you with us.

STATEMENT OF JULIAN ONORATO, CEO AND CHAIRMAN OF THE BOARD, EXPERTPLAN, INC.

Mr. ONORATO. Thank you.

Good morning. My name is Julian Onorato. I am the chief executive of ExpertPlan, based in East Windsor, New Jersey. My firm is a national leader in the small-business 401(k)-plan market, providing retirement-plan services for thousands of businesses and their employees throughout the country.

I am here today on behalf of the Council of the Independent 401(k) Recordkeepers, which is an organization of the Independent Retirement Plan Service Providers. CIKR is a sister organization of the American Society of Pension Professionals and Actuaries, which has thousands of members nationwide. I am also speaking

on behalf of the National Association of Independent Retirement Plan Advisors, a national organization of firms that provide independent investment advice to retirement plans and participants.

In order to make informed decisions, we believe that plans and plan participants should be provided with all the information that they need about fees and expenses in their 401(k) plans, in a form that is clear, uniform and useful. Therefore, we strongly support the 401(k) Fair Disclosure for Retirement Security Act of 2009.

And we thank you, Mr. Chairman, and members of the committee, for your leadership on this important issue. The bill will go a long way toward addressing some legitimate concerns about the system, and make 401(k) plans work better for American workers who depend on them.

The 401(k)-plan industry delivers investments and services to plan sponsors and their participants, using two primary business models, commonly known as "bundled" and "unbundled."

Bundled providers are large financial-services companies whose primary business is manufacturing and selling investments. They bundle their proprietary investment products, with plan services, into a package that is sold to plan sponsors.

By contrast, unbundled, or independent, providers are primarily in the business of offering retirement-plan services. They will couple such services with a universe of unaffiliated investment alternatives, whether a firm is a bundled investment firm, or an unbundled independent, this full scope of services offered to plans and their participants is the same.

In other words, the only real difference to the plan sponsor is whether the services are provided by just one firm, or more than one firm. Under ERISA, the business owner, as a plan fiduciary, must follow prudent practices, when choosing retirement-plan service providers. This prudent evaluation should include an apples-to-apples comparison of services provided, and the costs associated with those services.

The only way to determine whether a fee for a service is reasonable, is to compare it to a competitor's fee for that service.

In addition, if the breakdown of fees is not disclosed, plan sponsors will not be able to evaluate the reasonableness of fees as account balances grow. Take a $1 million plan serviced by a bundled provider that is only required to disclose a total fee of 125 basis points, or $12,500.

If that plan grows to $2 million, the fee doubles to $25,000, although the level of plan services and the costs of providing such services have remained the same.

The bundled providers want to be exempt from uniform disclosure rules. Simply put, they want to be able to tell business owners that they can offer retirement-plan services for free. Of course, there is no free lunch. And there is no such thing as a free 401(k) plan.

In reality, the cost of these free plan services are being shifted to participants through the investment-management fees, charged on the proprietary investments; in many cases, without their knowledge.

As provided in the bill, by breaking down plan fees into only three simple categories—investment management, record-keeping

and administration, and selling costs—we believe business owners will have he information they need to satisfy their ERISA duties.

The retirement security of employees is completely dependent upon the business owner's choice of retirement-plan service providers. If the fees are unnecessarily high, the workers' retirement income will be severely impacted. It is imperative that the business owner have the best information to make the best choice.

We commend Chairman Miller and Andrews for the uniform application of new disclosure rules to all 401(k)-plan service providers, in their bill. The last topic I want to touch on is independent investment advice, which this committee examined at a hearing last month.

With the growth of 401(k) plans, the importance of investment advice to participants of retirement plans, has become increasingly clear. The majority of Americans are not experts on how to appropriately invest their retirement savings.

We believe that working Americans are best served by independent investment advice, provided by qualified advisors; not conflicted investment advice, where the advisor has a financial interest in what investment choices to recommend.

In my over two decades of experience in this industry, I can absolutely testify that participant rates of return are better when served by independent advisors.

We commend Chairman Andrews for his recent legislation, promoting independent advice for retirement plans and participants.

Thank you again, and I welcome your questions.

[The statement of Mr. Onorato follows:]

Prepared Statement of Julian Onorato, CEO, ExpertPlan, Inc., on Behalf of CIKR, ASPPA and NAIRPA

Thank you, Mr. Chairman and members of the subcommittee. My name is Julian Onorato and I am the CEO of ExpertPlan, Inc. based in East Windsor, New Jersey. ExpertPlan was founded as a technology innovator in the administration of retirement programs. With continued investment in operating efficiencies and client service, ExpertPlan is a leader in the defined contribution market, providing retirement services for thousands of companies and organizations with billions of dollars in retirement assets.

I am here today on behalf of the Council of Independent 401(k) Recordkeepers (CIKR), the American Society of Pension Professionals & Actuaries (ASPPA), and the National Association of Independent Retirement Plan Advisors (NAIRPA) to testify on important issues relating to 401(k) plan fee disclosure addressed in Chairmen Miller and Andrews' legislation, the 401(k) Fair Disclosure for Retirement Security Act of 2009. CIKR, ASPPA and NAIRPA strongly support the premise that plans and plan participants should be provided with all the information they need about fees and expenses in their 401(k) plans-in a form that is clear, uniform and useful-to make informed decisions about how to invest their retirement savings plan contributions. This information is critical to millions of Americans' ability to invest in a way that will maximize their retirement savings so that they can achieve adequate retirement income. Accordingly, CIKR, ASPPA and NAIRPA strongly support the 401(k) Fair Disclosure for Retirement Security Act of 2009.

CIKR, ASPPA and NAIRPA also believe that working Americans should not have their retirement assets exposed to conflicted investment advice where the adviser has a financial interest in what investment choices to recommend to the plan and participants. Instead, American workers should have access to independent investment advice provided by qualified advisers. This issue was addressed by this Committee at a hearing on March 24. CIKR, ASPPA and NAIRPA strongly support legislation recently introduced by Chairman Andrews that would promote the provision of independent advice to plans and participants.

CIKR is a national organization of 401(k) plan service providers. CIKR members are unique in that they are primarily in the business of providing retirement plan

services as compared to larger financial services companies that primarily are in the business of selling investments and investment products. As a consequence, the independent members of CIKR, many of whom are small businesses, make available to plan sponsors and participants a wide variety of investment alternatives from various financial services companies without bias or inherent conflicts of interest. By focusing their businesses on efficient retirement plan operations and innovative plan sponsor and participant services, CIKR members are a significant and important segment of the retirement plan service provider marketplace. Collectively, the members of CIKR provide services to approximately 70,000 plans covering three million participants holding in excess of $130 billion in assets. ASPPA is a national organization of more than 6,500 members who provide consulting and administrative services for qualified retirement plans covering millions of American workers. ASPPA members are retirement professionals of all disciplines, including consultants, investment professionals, administrators, actuaries, accountants and attorneys. Our large and broad-based membership gives ASPPA a unique insight into current practical applications of ERISA and qualified retirement plans, with a particular focus on the issues faced by small- to medium-sized employers. ASPPA's membership is diverse but united by a common dedication to the employer-sponsored retirement plan system. NAIRPA is a national organization of firms, not affiliated with financial services companies, which provide independent investment advice to retirement plans and participants. NAIRPA's members are registered investment advisors whose fees for investment advisory services do not vary with the investment options selected by the plan or participants. In addition, NAIRPA members commit to disclosing expected fees in advance of an engagement, reporting fees annually thereafter and agreeing to serve as a plan fiduciary with respect to all plans for which it serves as a retirement plan advisor. Background on 4011(k) Plan Fee Disclosure Legislation CIKR, ASPPA and NAIRPA strongly support the House Education and Labor Committee's interest in examining issues relating to 401(k) fee disclosure and the impact of fees on a plan participant's ability to save adequately for retirement. We are particularly pleased with the reintroduction of the 401(k) Fair Disclosure for Retirement Security Act of 2009. This bill will shine much needed light on 401(k) fees.

We also are encouraged by the introduction of two other pieces of legislation by Congress on the fee disclosure issue. On February 9, 2009, Senators Tom Harkin (D-IA) and Herb Kohl (D-WI) reintroduced their 401(k) plan fees legislation, S. 401, the "Defined Contribution Fee Disclosure Act of 2009." In addition, H.R. 3765, the "Defined Contribution of Plan Fee Transparency Act," was introduced on October 4, 2007 and sponsored by House Ways and Means Committee Subcommittee on Select Revenue Measures Chairman Richard Neal (D-MA) and co-sponsored by Rep. John Larson (D-CT).

We support all three bills' even-handed application of new disclosure rules to all 401(k) plan service providers. Further, we also encourage you to strike the right balance between disclosure information appropriate for plan sponsors versus plan participants. To demonstrate how both of these goals can be accomplished, we have attached to these comments two sample fee disclosure forms for your consideration—one for plan fiduciaries and another for plan participants. Each is tailored to provide plan fiduciaries and plan participants with the different sets of information on fees that are needed to make informed decisions.

Department of Labor Regulations

The Department of Labor (DOL) has finalized one 401(k) fee disclosure project, a revised Form 5500, including a revised Schedule C, which was effective beginning on January 1, 2009. In December 2007, DOL issued proposed regulations under ERISA §408(b)(2) which would have provided sweeping changes on what constitutes a reasonable contract or arrangement between service providers and plan fiduciaries. The proposed rules would have required enhanced disclosures for service providers to 401(k) plan fiduciaries. However, the proposed regulations would have required only an aggregate disclosure of compensation and fees from bundled service providers, with narrow exceptions, and would not have required a separate, uniform disclosure of the fees attributable to each part of the bundled service arrangement.

In July 2008, DOL also issued proposed regulations under ERISA §404(a) setting forth a set of new participant fee disclosure requirements. The proposed rules would have required the disclosure to plan participants and beneficiaries of identifying information, performance data, benchmarks and fee and expense information of plan investment options in a comparative chart format, plus additional information upon request. However, no information on investment fees actually incurred with respect to a participant's account would have to be disclosed. Further, administration charges embedded in investment-related fees would not have to be separately dis-

closed. On January 20, Rahm Emanuel, assistant to President Obama and White House Chief of Staff, signed an order requiring the withdraw from the Office of the Federal Register (OFR) of all proposed or final regulations that had not been published in the Federal Register so that they could be reviewed and approved by a department or agency head. The proposed ERISA § 408 (b)(2) and participant fee disclosure regulations were sent to the Office of Management and Budget (OMB) in final rule form for review and approval. However, the regulations had not yet been released by OMB or sent to the OFR as of January 20. Therefore, the regulations have been stopped by the Emanuel order. ASPPA and CIKR submitted comprehensive comment letters to the DOL on both the 408(b)(2) and participant fee disclosure proposed regulations.[1] In both of these comment letters, we made a number of significant recommendations to improve each of the disclosure regimes in order to ensure that understandable and meaningful disclosure is provided, and stressed the need for uniform disclosure requirements—among all types of service providers.

The 401(k) plan industry delivers investments and services to plan sponsors and their participants using two primary business models-commonly known as "bundled" and "unbundled." Generally, bundled providers are large financial services companies whose primary business is selling investments. They "bundle" their proprietary investment products with affiliate-provided plan services into a package that is sold to plan sponsors. By contrast, "unbundled," or independent, providers are primarily in the business of offering retirement plan services. They will couple such services with a "universe" of unaffiliated, non-proprietary, investment alternatives. Generally, the costs of the bundled and unbundled arrangements are comparable or even slightly less in the unbundled arrangement. Under current business practices, bundled providers disclose the cost of the investments to the plan sponsor but do not break out the. cost of the administrative services. Unbundled providers, however, disclose both, since the costs are paid to different providers (i.e., administrative costs paid to the independent provider and investment management costs paid to the managers of the unaffiliated investment alternatives).

Bundled and unbundled providers have different business models, but for any plan sponsor choosing a plan, the selection process is exactly the same. The plan sponsor deals with just one vendor, and one model is just as simple as the other. Plan sponsors must follow prudent practices and procedures when they are evaluating service providers and investment options. This prudent evaluation should include an "apples to apples" comparison of services provided and the costs associated with those services. The only way to determine whether a fee for a service is reasonable is to compare it to a competitor's fee for that service.

The retirement security of employees is completely dependent upon the business owner's choice of retirement plan service providers. If the fees are unnecessarily high, the workers' retirement income will be severely impacted. It is imperative that the business owner have the best information to make the best choice.

While the DOL's proposed ERISA §408(b)(2) rules (relating to whether a contract or arrangement is reasonable between a service provider and plan fiduciary) would have required enhanced disclosures for service providers to 401(k) plan fiduciaries, the proposed regulation would have required only an aggregate disclosure of compensation and fees from bundled service providers, with narrow exceptions, and would not have required a separate, uniform disclosure of the fees attributable to each part of the bundled service arrangement. Although we appreciated the DOL's interest in addressing fee disclosure, we do not believe that any requirement that benefits a specific business model is in the best interests of plan sponsors and participants.

Without uniform disclosure, plan sponsors will have to choose between a single price business model and a fully disclosed business model that will not permit them to appropriately evaluate competing provider's services and fees. Knowing only the total cost will not allow plan sponsors to evaluate whether certain plan services are sensible and reasonably priced and whether certain service providers are being overpaid for the services they are rendering.

In addition, if the breakdown of fees is not disclosed, plan sponsors will not be able to evaluate the reasonableness of fees as participant account balances grow. Take a $1 million plan serviced by a bundled provider that is only required to dis-

[1] We note that House Education and Labor Committee Chairman Miller, House Education and Labor Subcommittee Chairman Andrews, Senate HELP Committee Chairman Kennedy (D-MA), Special Aging Committee Chairman Herb Kohl (D-WI) and Senate HELP Committee Member Tom Harkin (D-IA) also submitted joint comment letters to the DOL on both the 408(b)(2) regulation and participant fee disclosure regulation. These comments expressed concerns about the DOL's approach to these disclosure initiatives and requested additional actions be taken to protect plan participant and beneficiaries.

close a total fee of 125 basis points, or $12,500. If that plan grows to $2 million, the fee doubles to $25,000, although the level of plan services and the costs of providing such services have generally remained the same.

The bundled providers want to be exempt from adhering to uniform disclosure rules and regulations. Simply put, they want to be able to tell plan sponsors that they can offer retirement plan services for free while independents are required to disclose the fees for the same services. Of course there is no "free lunch," and there is no such thing as a free 401(k) plan. In reality, the costs of these "free" plan services are being shifted to participants through the investment management fees charged on the proprietary investment alternatives, in many cases without their knowledge. The uniform disclosure of fees is the only way that plan sponsors can effectively evaluate the retirement plan they will offer to their workers. To show it can be done, attached is a sample of how a uniform, plan sponsor disclosure would look. By breaking down plan fees into only three simple categories—investment management, recordkeeping and administration, and selling costs and advisory fees—we believe plan sponsors will have the information they need to satisfy their ERISA duties. We commend Chairmen Miller and Andrews for the even-handed application of new disclosure rules to all 401(k) plan service providers in the 401(k) Fair Disclosure for Retirement Security Act of 2009. Uniform disclosure of fees, as provided by the Miller-Andrews legislation, will allow plan sponsors to make informed decisions and satisfy their ERISA duties. The breakdown of fees required in the legislation also will allow plan sponsors to assess the reasonableness of fees by making "apples to apples" comparison of other providers and will allow fiduciaries to determine whether certain services are needed, leading to potentially even lower fees.

The level of detail in the information needed by 401(k) plan participants differs considerably from that needed by plan fiduciaries. Plan participants need clear and complete information on the investment choices available to them through their 401(k) plan, and other factors that will affect their account balance. In particular, participants who self-direct their 401(k) investments must be able to view and understand the investment performance and fee information charged directly to their 401(k) accounts in order to evaluate the investments offered by the plan and decide whether they want to engage in certain plan transactions. The disclosure of investment fee information is particularly important because of the significant impact these fees have on the adequacy of the participant's retirement savings. In this regard, studies have shown that costs related to the investments account for between roughly 87 percent and 99 percent of the total costs borne by participant accounts, depending on the number of participants and amount of assets in a plan.[2]

CIKR, ASPPA and NAIRPA urge that any new disclosure requirements to plan participants also be uniform, regardless of whether the service provider is bundled or unbundled. In July 2008, the DOL issued proposed regulations on participant fee disclosure that required the annual disclosure to plan participants and beneficiaries of identifying information, performance data, benchmarks and fee and expense information in a comparative chart format, plus additional information upon request. The proposed regulation further required an initial and annual explanation of fees and expenses for plan administrative services to plan participants and beneficiaries (disclosed on a percentage basis) except to the extent included in investment-related expenses. The effect of this exception would have been to highlight administrative costs for one business model (unbundled) over another (bundled), which would result in a disparity of treatment and confusion. In most plans, the administrative costs of recordkeeping, reporting, disclosure and compliance are borne, at least to some extent, by the investments. For bundled providers, the entire administrative cost is generally covered by investment-related fees charged on proprietary investments. For an unbundled provider, however, those costs are often paid through revenue sharing received from unrelated investments, which, in many instances, is not sufficient to offset the entire cost. Accordingly, for unbundled providers, there would be a direct administrative charge assessed against participants' accounts. In effect, the DOL's proposed requirement to disclose administrative expenses except to the extent included in investment-related expenses would have imposed an additional and burdensome disclosure requirement on unbundled service providers, whereas there would be no such disclosure in the case of a bundled service provider. This would be misleading to most plan participants. In only the unbundled case would participants see separate administrative costs charged against his or her account, while with bundled providers, participants would be given the impression there were no administrative costs at all as the administrative costs would be imbedded in the investment costs.

[2] 2007 edition of the 401(k) Averages Book, published by HR Investment Consultants.

Accordingly, CIKR, ASPPA and NAIRPA recommend that the disclosure of administrative and investment information be provided on a uniform basis in any legislation considered by Congress. We believe that administrative fee information provided on the same annualized basis as investment costs would provide participants a more complete picture of the total costs of the plan at a single time, regardless of the business model of a service provider.

It also is important to recognize that there is a cost to any disclosure, and that cost is most often borne by the plan participants themselves. To incur costs of disclosure of information that will not be relevant to most participants will unnecessarily depress the participants' ability to accumulate retirement savings within their 401(k) plans. Thus, appropriate disclosure must be cost-effective, too. The result of mandatory disclosure should be the provision of all the information the plan participant needs, and no more. To require otherwise would unjustifiably, through increased costs, reduce participants' retirement savings. Those participants who want to delve further into the mechanics and mathematics of the fees associated with their investment choices and other potential account fees should have the absolute right to request additional information-it should be readily available on a Web site, or upon participant request. This will take care of those participants who feel they need more detailed information. For the Committee's consideration, ASPPA, CIKR and NAIRPA have attached a sample fee menu to the testimony that we believe would contain, in a clear and simple format, all the information a plan participant would need to make informed decisions about his or her plan.'

The 401(k) Fair Disclosure for Retirement Security Act of 2009 requires two participant disclosure requirements: a "before-the-fact" notice of investment options and a revised quarterly statement requirement. The notice of investment options requires specific information be provided with respect to each available investment option, such as the investment option's risk level. The notice also must include a plan fee comparison chart that includes a comparison of actual service and investment charges that will or could be assessed against the participant's account. The chart must set fees into four categories: (1) fees depending on a specific investment option selected by the participant (including expense ratio and investment-specific asset based fees); (2) fees assessed as a percentage of total assets; (3) administrative and transaction based fees; and (4) any other charges deducted not described in the first three categories. The legislation also would amend the existing quarterly benefit statement requirement to mandate inclusion of specific information attributable to each participant's account, including starting balances and investment earnings or losses.

We are very pleased that the disclosure requirements for plan participants in the 401(k) Fair Disclosure for Retirement Security Act of 2009 are uniform, regardless of whether the service provider is bundled or unbundled. This will provide participants with a complete picture of total costs and avoid confusion. We also commend Chairmen Miller and Andrews for the legislation's plan fee comparison chart requirement. This chart is similar to the sample participant fee menu that is attached to this testimony. It will provide participants with an easy to understand summary of fees which will allow them to make informed decisions about how to invest their retirement saving plan contributions. However, we ask the Committee to reconsider the level of detail required for participants. It is important that participant disclosures be concise, meaningful and readily understandable—especially, since any new disclosure requirements will carry costs for participant disclosures. We also ask that the Committee consider defining "small plan", for purposes of permitting annual statements, as "fewer than 100" participants and beneficiaries, as in H.R. 3185 passed by the Committee in the last Congress. Many small employers with more than 25 participants are struggling in the current economy, and the additional cost of more frequent reporting may discourage them from maintaining the company's 401(k) program.

ERISA and the Internal Revenue Code generally prohibit plan fiduciaries from rendering any investment advice to plan participants and beneficiaries that would result in the payment of additional fees to the fiduciaries or their affiliates. The Pension Protection Act of 2006 (PPA) §601 provided a statutory prohibited transaction exemption to the rule [codified at ERISA §§ 408 (b)(14) and 408(g) and IRC §§ 4975(d)(17) and 4975(f)(8)] for certain transactions that may occur in connection with the provision of "eligible investment advice" by a "fiduciary adviser," subject to specific requirements. In particular, the final PPA investment advice provision allowed two specific permissible investment advice exceptions: (1) certain "fee-leveling" arrangements; or (2) certified computer model arrangements.

On August 22, 2008, the Department of Labor (DOL) issued proposed investment advice regulations interpreting PPA §601. On the same date, the DOL issued a separate prohibited transaction class exemption (Class Exemption) that provided relief

for certain transactions that went beyond the scope of relief contemplated in the statutory language. DOL issued final investment advice regulations (Final Regulation) on January 21, 2009, that incorporated the separate Class Exemption. into the Final Regulation. However, the status of these regulations is unclear at this point. In response to Rahm Emanuel's memorandum directing Agency Heads to consider extending for 60 days the effective date of regulations that had been published in the Federal Register but not yet taken effect, on February 4, 2009 the DOL proposed extending the effective date for the investment advice rules from March 23 until May 22, 2009 to allow the public to comment on whether the rules raise significant policy and legal issues. ASPPA and CIKR submitted comments in support of the extended effective date due to the uncertainty surrounding the final disposition of the regulations. On March 19, the DOL issued a final rule delaying the effective date to May 22. The Final Regulation's interpretation of the statutory exemption in PPA will make it more likely that participants and beneficiaries may obtain assistance in diversifying investments and appropriately reflecting their own risk tolerances and investment horizons in asset allocations. However, the portion of the Final Regulation which implements the non-statutory Class Exemption (i.e., the portion that does not relate to the statutory exemption from the prohibited transaction rule enacted in PPA) may expose participants and beneficiaries to conflicted investment advice without sufficient protection from the effects of an adviser's conflicts of interest. Furthermore, this exemption is contrary to Congressional intent.

Accordingly, ASPPA, CIKR and NAIRPA recommend that the DOL withdraw the Class Exemption portion of the Final Regulation. The enactment of ERISA §§ 408(b)(14) and 408(g) reflect Congressional desire to provide very limited relief for providing conflicted investment advice. The Final Regulation expands this relief in a manner that does not provide adequate protection to participants and beneficiaries.

With the growth of participant-directed individual account plans, the importance of investment advice to participants and beneficiaries of retirement plans has become increasingly clear. The majority of Americans are not experts on how to appropriately invest their retirement savings. However, due to the shift from defined benefit to defined contribution plans, many Americans are required to do just that.

CIKR, ASPPA and NAIRPA believe that working Americans are best served by independent investment advice provided by qualified advisers, not conflicted investment advice where the adviser has a financial interest in what investment choices to recommend. We believe that participants' rates of return are better when served by an independent adviser. We commend Chairmen Andrews for his recent legislation promoting independent advice for retirement plans and participants.

Summary

The retirement system in our country is the best in the world, and competition has fostered innovations in investments and service delivery. However, important changes are still needed to ensure that the retirement system in America remains robust and effective into the future. By supporting plan sponsors through uniform disclosure of fees and services and by encouraging plan sponsors to provide independent investment advice to participants, American workers will have a better chance at building retirement assets and living the American dream.

CIKR, ASPPA and NAIRPA applaud the House Education and Labor Committee's leadership in exploring issues related to 401(k) plan fee disclosure and independent investment advice and in introducing the 401(k) Fair Disclosure for Retirement Security Act of 2009. The Committee's consistent focus on retirement issues over the years has advanced improvements in the employersponsored pension system and led to an increased concern about the retirement security of our nation's workers. CIKR, ASPPA and NAIRPA look forward to working with Congress and the Administration on these important issues.

ATTACHMENTS: SAMPLE FEE DISCLOSURE FORM (PLAN SPONSORS)

ABC Company 401(k) Plan

XYZ Service Provider Disclosure -- Expected Plan Expenses
For Plan Year Beginning January 1, 2008

The following expenses may be charged to to the plan. Some of these expenses may reduce the value of participant accounts. Some plan expenses may be paid by the plan sponsor.

I. Investment Expenses - The investments offered by the plan have related expenses. The amounts listed below are the annual percentage that will be charged based on the amount the participant placed in the particular investment.

EXAMPLE: If the fee is 0.50% and a participant placed $1,000 in that investment for one year, the participant's account would pay $5 for that type of expenses for that investment.

Investment Option	Investment Management Fees[1]	Administrative & Recordkeeping Fees[2]	Selling Costs & Advisory Fees[3]	Total
AAA Investment	0.50%	0.20%	0.25%	0.95%
BBB Investment	0.42%	0.20%	0.25%	0.87%
CCC Investment	0.20%	0.20%	0.25%	0.65%
DDD Investment	0.60%	0.20%	0.25%	1.05%
EEE Investment	0.35%	0.20%	0.25%	0.80%

II. Other Asset Based Fees - These fees are assessed on the total assets in the plan and are not investment specific.

Type of Fee	Investment Management Fees	Administrative & Recordkeeping Fees	Selling Costs & Advisory Fees	Total
Plan Level Fee		0.20%		0.20%
Investment Advisory Fees			0.40%	0.40%
- Plan Expense Reimbursement		-0.20%	-0.25%	-0.45%
Net Fees on Total Plan Assets		**0.00%**	**0.15%**	**0.15%**

III Fees Paid Directly by Plan Sponsor - These fees are paid by the plan sponsor and are not paid out of plan assets.

Type of Fee	Investment Management Fees	Administrative & Recordkeeping Fees	Selling Costs & Advisory Fees	Total
Plan Sponsor Paid Fees		$1,000		$1,000

IV. Total Fees - These are the total fees based on estimated assets of $1 million and 20 participants. The fees assessed on investments are based on the allocation of investments by the 20 participants in the plan as of 90 days prior to the date of this notice. These amounts do not include transactional expenses (see below).

Type of Fee	Investment Management Fees	Administrative & Recordkeeping Fees	Selling Costs & Advisory Fees	Total
Total Expenses on Investments	$4,140	$2,000	$2,500	$8,640
Total Asset Based Fees			$1,500	$1,500
Total Fees Paid by Plan Sponsor		$1,000		$1,000
Total	**$4,140**	**$3,000**	**$4,000**	**$11,140**

V. Transactional Expenses - These fees are only charged when participants request the services described below.

Service	Fee
Brokerage Account	$60 per year
Participant Loan Origination Fee	$50 per loan
Distribution	$35 per distribution (including rollovers)

VI. Conflict Statement

All of the investments are provided by unaffiliated parties. XYZ Service Provider receives revenue sharing from all investments for recordkeeping and administrative services, and for advisory services, which is used to offset fees otherwise charged for such services as disclosed in Section II. above.

[1] Investment management fees are the portion of the expense ratio allocated to investment management expenses.
[2] Administrative and recordkeeping is the portion of the expense ratio attributable to administration and recordkeeping plus any additional administrative and recordkeeping charges attached to the investments.
[3] These include 12b-1 fees and other related selling costs and advisory fees attached to the investments.

ABC Company 401(k) Plan

Direct Participant Expenses

As of January 1, 2007

The following estimated expenses may be charged to your account, depending on the investments you select, the types of services received by the plan and the types of transactions you request. Fees are just one issue to consider when selecting an investment option, and you should consult other information provided by the plan sponsor regarding plan investment options before making a decision.

I. Investment Expenses - The investments offered by the plan have related expenses. The amounts listed below are the annual percentage that will be charged based on the amount you placed in the particular investment. A portion of the fee will be charged if you change your investments during the year. The expense ratio reflects the percentage of fund assets that are used for administrative, management, advertising and promotion (12b-1 fees), and all other expenses and directly affect the returns of your investment options. It does not include sales loads or brokerage commissions.

EXAMPLE: If the Expense Ratio is 0.5% and you placed $1,000 in that investment for one year, you would pay $5 for these types of expenses for that investment. Additional expenses, such as a wrap fee, redemption fee and/or surrender charge may also apply.

Investment Option	Expense Ratio (as a percentage)	Investment-Specific Wrap Fee	Redemption Fee[1]	Surrender Charge[2]
AAA Investment	0.30%	0.00%	0.00%	0.00%
BBB Investment	0.50%	0.10%	0.00%	6.00%
CCC Investment	0.40%	0.20%	2.00%	0.00%
DDD Investment	0.25%	0.00%	1.50%	0.00%
EEE Investment	0.35%	0.00%	0.00%	3.00%
FFF Investment	0.40%	0.10%	0.00%	4.00%
GGG Investment	0.50%	0.00%	1.00%	0.00%
HHH Investment	0.55%	0.25%	1.25%	0.00%

II. Fees on Total Plan Assets[3] - These fees are assessed on the total assets in your account and are not investment specific. Wrap fees are for various expenses, such as sales commissions, administrative expenses, and/or recordkeeping fees.

Type of Fee	Amount of Fee
Wrap Fee	0.35%
Registered Investment Advisory Fees	0.50%
- Estimated Plan Expense Reimbursement Offset	-0.30%
Net Fees on Plan Assets	0.55%

III. Administrative and Transactional Expenses - The Annual Administrative and Recordkeeping Charge is paid by all participants. However, the remaining fees (*i.e.*, transactional expenses) are only charged when you request the service.

Service	Amount of Fee
Annual Administrative and Recordkeeping Charge	$50 per year
Brokerage Account	$60 per year
Participant Loan Origination Fee	$50 per loan
Annual Loan Charge	$25 per year
Distribution	$35 per distribution (including rollovers)
Domestic Relations Orders	$100 per order

1 May be imposed by provider as a result of changing your investments multiple times in a given period. See the investment provider's redemption fee policy for additional information.

2 May be imposed if you sell or withdraw money from the investment within a given number of years after you invest. This fee may be reduced based on the length of time your money has been invested. You should consult your plan sponsor for more information before engaging in any transactions with respect to this investment.

3 Wrap fees and investment advisory fees are charged at the plan level. Some plans use expense reimbursements, such as revenue sharing, to offset these costs.

Chairman ANDREWS. Thank you very much, Mr. Onorato, for your contribution.

Mr. Chambers, welcome back. We always appreciate your valued and constructive input in anything we do. Good to have you with us.

STATEMENT OF ROBERT G. CHAMBERS, FORMER CHAIRMAN OF THE BOARD, AMERICAN BENEFITS COUNCIL AND PARTNER, MCGUIRE WOODS

Mr. CHAMBERS. Thank you. It has been a pleasure so far—remains to be seen.

And thank you to all of the members of the subcommittee, and the interlopers from the full committee, for the invitation.

My name is Robert Chambers, and I am a partner in the international law firm of McGuire Woods.

I hate to admit it, but I have advised clients with respect to 401(k) plan issues, since section 401(k) was added to the Internal Revenue code in 1978. I am also, as you noted, the past chair of the board of directors of the American Benefits Council, a trade association, on whose behalf I am testifying today.

In a nutshell, the council's goal for 401(k) plans is an effective system that functions in a transparent manner, and provides meaningful benefits at a fair price. To accomplish this, we support further improvement of the rules relating to plan-fee disclosure.

We very much appreciate the open and constructive approach that the committee used in amending H.R. 3185, prior to its adoption—or approval, rather—by the committee, last year. And we especially appreciate the openness to our ideas on the part of Chairman Miller and Mr. McKeon, Mr. Andrews, and Mr. Kline.

We are equally enthusiastic about the current bill, in that it includes a number of improvements to the proposed legislation, many of which are listed in our written testimony.

While our members continue to develop measures to ensure that fee levels are fair and reasonable for participants, there is room for improvement.

First, I am going to address liability issues, then suggest a few—Mr. Miller, I was going to use the word, "tweaks"—perhaps, "adjustments"—to the bill—and, finally, make a request regarding the minimum-investment option.

The principal concern of many plan sponsors in this area relates to proliferating litigation, and the potential liability of plan sponsors and fiduciaries.

Over the past few years, we have seen significant growth in plan-fee litigation involving defined-contribution plans. Plan sponsors cannot afford to take legal compliance lightly. All litigation—even litigation where there has been no wrongdoing—is extremely costly.

Plan sponsors are especially frustrated by so-called "strike suits." These are suits in which litigation is filed ostensibly for the purpose of surviving a motion to dismiss, causing the sponsor to consider a large settlement, in lieu of, perhaps, paying even larger litigation expenses in defending the action to its conclusion.

The effect of this litigation on plan sponsors has been very dramatic. It is a drain on resources and time. It interferes with sound business planning. And, frankly, it undermines retirement security by reducing sponsors' commitment to providing retirement programs.

And, equally important, we want to correct the misimpression of those who view litigation as a positive means to vindicate employee rights, and to transfer value to employees.

Fee litigation largely transfers value to the legal system, and results in the transfer of remarkably little value to employees. It leads to lower employer contributions, higher fees, reduced account balances, and less-comprehensive services for all participants.

So here are four of our members' specific liability concerns, in areas covered by the bill.

First, there should be no liability where an employee discloses to participants fee information that has been provided by a service provider, and that turns out to be incorrect.

Second, handling unbundled information can be confusing. The bill would require a bundled service provider to disclose separate fees for administrative and investment services, even though the bundled service provider does not actually offer those services separately.

Since the only commercially reasonable action for plan sponsors is to compare the total cost of bundled and unbundled services, plan sponsors need clarification that their taking this action will satisfy their fiduciary duties. And, of course, further, the bill needs to provide similar protection when sponsors pass this unbundled information on to participants.

Third, the bill needs to make clear that if the fiduciary obtains and discloses the information as required by ERISA, it will have satisfied those fiduciary duties. And, finally, minor inadvertent errors—for example, in disclosing the fees associated with an investment option—should not provide participants with a cause of action.

Therefore, we ask that you add these protections to the fee legislation, as you consider it.

I will now turn to fee-disclosure issues within the bill. While participants need a clear, simple short disclosures that will, effectively, communicate key points on whether to participate and how to invest, fiduciaries need more detailed information, since it is their duty to understand fully the options available, and to make prudent choices on behalf of all participants.

Despite the many improvements to the current bill, the council does believe that additional changes would be helpful. And here are three of them that are described at greater length in our written testimony.

First, the rules should be flexible enough to accommodate the full range of possible investment options, including self-directed brokerage accounts. Second, payments from one service provider to its affiliated service provider are not really revenue sharing, and should not be required to be disclosed without the fiduciary protection that I described earlier. And, finally, plan sponsors that pay fees should not be subject to any of the disclosure rules.

One last point with regard to the minimum-investment option: We note that it is considerably different than the option described in H.R. 3185, and we have developed several questions regarding the revised concept in the very brief period that we have had to review the draft language. Therefore, we request another opportunity to meet with members of the subcommittee, in order to obtain a better understanding of what the option entails and, of course, to discuss our questions.

So that is all. We thank you for this opportunity to share our views on the bill. And we look forward to continuing our very constructive dialogue on plan-fee disclosure, with both this subcommittee and the full committee. Thank you.

[The statement of Mr. Chambers follows:]

Prepared Statement of Robert G. Chambers, on Behalf of the American Benefits Council

My name is Robert G. Chambers, and I am a partner in the international law firm of McGuireWoods LLP. I have advised clients with respect to 401(k) plan issues since 401(k) was added to the Internal Revenue Code in 1978. In that regard, my clients have included both large and small employers that sponsor 401(k) plans as well as many financial institutions that provide services to 401(k) plans. I am also a past chair of the Board of Directors of the American Benefits Council ("Council"), on whose behalf I am testifying today. The Council is a public policy organization representing plan sponsors, principally Fortune 500 companies, and other organizations that assist employers of all sizes in providing benefits to employees. Collectively, the Council's members either sponsor directly or provide services to retirement and health plans that cover more than 100 million Americans.

The Council appreciates the opportunity to present testimony with respect to 401(k) plan fees. 401(k) plans have become a primary retirement plan for millions of Americans. Accordingly, it is more important than ever for all of us to take appropriate steps to ensure that 401(k) plans provide those Americans with retirement security. We recognize that the common goal is an effective 401(k) system that functions in a transparent manner and provides meaningful benefits at a fair price in terms of fees. We want to be as helpful to that process as possible. The Council Supports Enhanced Disclosure Requirements

The Council supports improvement to the rules regarding plan fee disclosure. Effective plan fee disclosure to participants can enable them to understand their options and to choose those investments that are best suited to their personal circumstances. Disclosure to plan fiduciaries enables them to evaluate the reasonableness of the fees that are charged by their current provider(s) and to shop for and negotiate services and fees from other providers.

While plan fiduciaries are receiving extensive information regarding various plan services and related fees and are using that information to negotiate effectively for lower fees, we believe more can and should be done to make that process even more effective. And while service providers are providing fiduciaries with tools that enable them to analyze fee levels and to provide meaningful information to participants, we believe more can be done to improve that exchange as well. Chairman Miller previously introduced H.R. 3185, a bill that addressed two key disclosure points:

• The disclosure of plan fees by a service provider to a plan administrator, and

• The disclosure of plan fees by a plan administrator to participants. We very much appreciate the open and constructive approach that the Committee used in amending H.R. 3185 prior to its approval by the Committee last year. We especially appreciate the openness to our ideas on the part of Chairman Miller, Ranking Member McKeon, Subcommittee Chairman Andrews, and Subcommittee Ranking Member Kline. The revised bill included many significant improvements to the proposed legislation, including:

• Facilitating the use of electronic communication.

• Reducing the extent of unbundling and number of categories required.

• Permitting the use of estimated dollar amounts.

• The recognition that investment options with a guaranteed rate of return need separate treatment.

• A helpful delay in the effective date.

• Outside the context of investment options, eliminating the need to disclose all subcontractors and payments to subcontractors.

• Recognition of the liability issue with respect to service providers (reasonable reliance by service providers on information from unaffiliated service providers).

These important improvements to H.R. 3185, considered in the previous Congress, are integral to making the disclosure of fees more effective. There are some specific proposals that we believe could be helpful in further improving the version of the 401(k) Fair Disclosure for Retirement Security Act of 2009 that will be considered in the current Congress.

Protecting the Voluntary System

Before discussing the proposals in the bill that we believe would benefit from further discussion and improvement, we would like to discuss what has become a top concern for many plan sponsors: plan sponsor and fiduciary liability. Over the past few years, we have seen significant growth in litigation involving defined contribution plans, much of which is directly related to plan fees. So, as this Subcommittee and the full Committee consider fee legislation, we urge you to also consider the nature of the fee-related litigation that has been filed and pay special attention to areas that could inadvertently increase litigation.

Plan sponsors cannot afford, either financially or from a participant-relations standpoint, to take legal compliance lightly. All litigation, even litigation when there has been no wrongdoing, is very costly. Plan sponsors are especially frustrated by socalled "strike suits"—litigation filed only for the purpose of surviving a motion to dismiss, causing the sponsor to consider a large settlement in lieu of incurring the even greater litigation expenses that defending the action would require.

The effect of the fee and other defined contribution plan-related litigation on plan sponsors has been very significant.

- Litigation is a drain on resources, time, and money.
- It interferes with sound business planning.
- It undermines retirement security by reducing the sponsor's commitment to providing retirement programs.

Equally important, we want to correct the misimpression of those who view substantial increases in litigation as a positive means to vindicate employee rights and to transfer value to employees. Realistically, litigation results in remarkably little transfer of value to employees.

- The increased risk of litigation becomes factored into the cost of benefit plans through lower employer contributions and higher fees, resulting in reduced account balances.
- The sponsor's value is reduced, adversely affecting the accounts of participants in other plans whose accounts are directly or indirectly invested in the sponsor.
- Services become less comprehensive.

More litigation leads to increasingly reduced benefits for all participants.

Here are a few of our members' concerns regarding the 401(k) Fair Disclosure for Retirement Security Act of 2009, along with suggested solutions:

- What happens if an employer discloses to participants fee information that has been provided by a service provider and that turns out to be incorrect? To have a workable system, a plan sponsor that reasonably relies on service provider information should not have any liability.
- What is a plan sponsor required to do with "unbundled" information? The bill would require a bundled service provider to disclose separate fees for administrative and investment services. However, the bundled service provider does not offer such services separately. It is unclear how plan sponsors should use the information to compare services. They cannot compare it directly to actual unbundled fee structures, since the plan sponsors cannot purchase the services separately from the bundled service provider for the disclosed fee. The commercially reasonable action would be to compare the total cost of the bundled and unbundled services. Plan sponsors need clarification that this action will satisfy their fiduciary duties in this regard.
- The bill should make clear that, by obtaining and disclosing the information required by ERISA, plan fiduciaries will have satisfied their fiduciary duties in this regard.
- Minor, inadvertent errors, for example, in disclosing the fees associated with an investment option, should not provide participants with a cause of action.

Disclosure by Plan Fiduciaries to Plan Participants

I will now turn to fee disclosure issues in the bill. It is critical to emphasize that the disclosure rules should take into account the sharply different circumstances of participants and plan fiduciaries. Participants value clear, simple, short disclosures that effectively communicate the key points that they need to know to decide whether to participate and, if so, how to invest. Plan fiduciaries need more detailed information since it is their duty to understand fully the options available and to make prudent choices on behalf of all of plan participants. Despite the many improvements to the current bill, the Council does believe that some additional changes could be made. These include:

- The rules must be flexible enough to accommodate the full range of possible investment options, including brokerage windows.
- Disclosure of revenue sharing between two or more unrelated service providers should be required. Payments from one service provider to its affiliated service provider are not viewed as revenue sharing and should not be required to be disclosed.

• Fees paid by plan sponsors should not be subject to any of the disclosure rules. Where plan assets are not involved, ERISA's rules are not implicated.
• Fees charged to service providers by their own service providers have no relevance to plans and should not be required to be disclosed.
• Unbundling for disclosure purposes requires the production of data that is not commercially useable raising questions about its value.

Minimum Investment Option

The decision to include a minimum investment option in the bill raises policies and questions that are distinct from those relating to fee disclosure. The minimum investment option in the bill is considerably different than the option described in H.R. 3185, and we have developed a number of questions regarding the new concept in the brief period that we have had to review the draft language.

We look forward to meeting with members of the Subcommittee to obtain a better understanding of what the option entails and to discuss our concerns.

Coordination of the Legislative and Regulatory Process

In the effort to improve the fee disclosure rules, we believe that it is very important that the legislative and regulatory processes be coordinated to avoid unnecessary costs and confusion resulting from having to change systems multiple times.

For example, it would be very harmful for the retirement system if one set of rules is created to be in effect for a year or two, only to be supplanted by a different set of rules. It is simply too confusing and too costly and not the best use of resources. Accordingly, we urge both Congress and the Department of Labor to consider how best to coordinate their efforts to avoid any adverse consequences.

Effective Date

Any revisions to the fee disclosure rules will require:
• Interpretation and implementation by the Department of Labor,
• Extensive systems changes, and
• Development of effective communication methods.

Accordingly, it is critical that legislation not be effective prior to plan years beginning at least 12 months after the publication of final regulations interpreting the legislation and that the Department of Labor be given a reasonable period of time to develop them.

We welcome this opportunity to share our views on the bill. We look forward to continuing our very constructive dialogue on plan fee disclosure—the bill and any new amendments that will be considered—with this Subcommittee and the full Committee.

Chairman ANDREWS. Thank you, Mr. Chambers. Your testimony was characteristically constructive and helpful. We appreciate it very, very much.

Mr. CHAMBERS. Thank you.

Chairman ANDREWS. Mr. Goldbrum, welcome to the committee.

STATEMENT OF LARRY H. GOLDBRUM, EXECUTIVE VICE PRESIDENT AND GENERAL COUNSEL, THE SPARK INSTITUTE

Mr. GOLDBRUM. Thank you.

Chairman Andrews, Ranking Member Kline, honorable members of the committee, my name is Larry Goldbrum, and I am general counsel of the Spark Institute, an association that represents a broad cross-section of the retirement-plan industry.

Our members collectively service more than 62 million plan participants. I am here to tell you that every one of my members believes that fee transparency will benefit plan participants, plan sponsors and, ultimately, the entire industry. We commend the committee for its efforts.

Our goal today, and, hopefully, in future collaborative efforts, is to ensure that the approach taken in any legislation has a meaningful impact on plan participants, and sponsors' ability to understand 401(k) fees, and does not unintentionally increase them.

We believe that the 401(k) plan system is a fundamentally sound, competitive and innovative system that provides the best way for Americans to save and invest for retirement, and provides good value for the fees that are charged.

We believe that the best approach to fee disclosure will be one that is flexible, concept-based, and allows disclosure materials to be tailored with comparable information for all of the investment options that are available.

Many misperceptions have emerged in the discussions about plan fees, which are addressed in a series of white papers we just released. Some of the misconceptions are that 401(k) plan fees are not a good value for American workers; plan fees do little more than erode retirement savings; service providers make too much money by raiding 401(k) plans; and fees are not understood because information is not disclosed.

Although time will not allow me to go into detail, I would like to note that, prior to 2008, the industry's average pre-tax profit margin was approximately 21 percent. It is expected to be 10 percent for 2008, and in negative territory for 2009. In the last 5 years, approximately 80 vendors have exited the business. Additionally, the vast majority of service providers provide substantial, detailed and understandable information about fees, above and beyond what current law requires, because doing so makes good business sense.

Service providers are already regulated by multiple agencies, including the IRS, DOL, SEC, OCC, FINRA and state insurance and securities regulators. Multiple disclosure standards make compliance expensive. We support a coordinated approach to fee disclosure.

The proposal requires service providers to make detailed disclosure about fees in predetermined categories. We urge the committee to reconsider whether requiring disclosure to a one-size-fits-all solution is appropriate. Not all fees fit into categories. And no single form can adequately address the diversity of products and service structures, without favoring one segment of the industry over others.

A statutory framework must be flexible for the vast array of investment products and service structures, and be able to accommodate the ever-changing retirement and investment industries.

Much has been made about the debate over bundled versus unbundled fee disclosure. Unbundled providers argue that their services may seem more expensive, when compared to services offered by bundled providers. Bundled providers argue that they may not offer component services on an unbundled basis, do not have unbundled pricing information available, and unbundled pricing information can be arbitrary and potentially misleading.

We view this debate as a distraction from the real issue: The need for useful fee disclosure to plan sponsors, so they can make sound fiduciary decisions. Plan sponsors will have preferences towards bundled or unbundled providers, and can ask for unbundled pricing information.

Similarly, providers should be able to structure and price their products on an unbundled or on a bundled basis, as they choose. When a bundled provider is asked for unbundled pricing informa-

tion, it may choose to comply in order to retain existing, or win new business. Market forces, industry best practices and the threat of litigation and regulatory enforcement should drive behavior.

Ultimately, the bundled-versus-unbundled debate is more about providers with different product and pricing structures arguing about business competition, rather than an alleged defect in fee disclosure. New laws should not attempt to resolve this business debate.

Plan service providers are ready to assist plan sponsors to provide plan-fee information to participants. We support a flexible concept-based legislative framework. However, the proposal mandates an omnibus notice and chart that many participants may find will not provide more useful or understandable information.

Categorizing fees by the way they are charged, which may have nothing to do with what they are for, may not increase participants' understanding. Participants should be provided with total investment-fee information such as expense ratios. Many participants may not find the additional underlying details to be useful in making better decisions.

We are concerned that the proposal requires participants' statements to include dollar-basis disclosures of fees that are embedded in investment products, such as most investment-management fees. While rate disclosure is possible, the information that would be needed for dollar disclosures on statements is simply not available on the plan record-keeping systems.

We are concerned that the index-fund requirement as the condition for 404(c) fiduciary protection is effectively a mandate, which is unprecedented under ERISA. We are also concerned about the subjective nature of the requirement, because reasonable investment experts are likely to disagree on what funds will satisfy the requirement. And we have all been painfully reminded: Past performance is no guarantee of future results.

We are concerned that this subjective requirement will expose plan sponsors to increase litigation risk, and that mandating the use of index fund as a way to reduce plan costs relies on a misconception that it will change the economics of plan-administration fees.

I thank you for the opportunity to express my——

[The statement of Mr. Goldbrum follows:]

Prepared Statement of Larry H. Goldbrum, Esq., General Counsel, the SPARK Institute

Chairman Andrews, Ranking Member Kline, honorable members of the Committee, my name is Larry Goldbrum and I am General Counsel of The SPARK Institute, an industry association that represents the interests of a broad based cross section of retirement plan service providers, including record keepers and investment managers who will be affected by the proposed 401(k) Fair Disclosure for Retirement Security Act of 2009 (the "Bill"). Our members include most of the largest service providers in the retirement plan industry and collectively they service more than 62 million defined contribution plan participants. It is an honor for me to share our organization's views on the proposed legislation. I welcome the opportunity to respond to your questions after my opening statement.

Introduction

The SPARK Institute supports and encourages fee transparency that helps plan sponsors and participants understand the fees and expenses that they pay for plan and investment services, and make decisions on a fully informed basis. We commend the Committee for its efforts in this area. Our goal today and hopefully in

future collaborative efforts is to ensure that the approach taken in any legislation has a meaningful impact on plan participants and sponsors ability to understand 401(k) fees and does not unintentionally drive those fees up.

The SPARK Institute believes that America's employer-sponsored retirement plan system is a fundamentally proven, sound, competitive and innovative system that:

- Provides the best way for American workers to save and invest to reach their retirement goals, and
- Provides valuable services and good value for the cost.

Fee disclosure should be a part of an overall assessment made by plan sponsors and participants about the value they receive for the cost. In addition to fees, plan sponsors and participants must evaluate investment performance and the quality and utility of the services provided. Ultimately, the best approach to fee disclosure will be one that is flexible, concept-based and allows service providers and plan sponsors to tailor disclosures with comparable information for each plan investment option. This measured approach will avoid overwhelming participants with extensive detail and will help them understand the fees they are paying and the services they are receiving in return. If we are not careful, however, requirements intended to help participants could instead increase costs and create potential fertile ground for lawsuits against plan sponsors without helping participants make informed choices.

Many misperceptions and misunderstandings have emerged in the discussions about plan fees and their disclosure. I would like to try to correct some of those misperceptions today. In addition, while we have not had sufficient time in advance of this hearing to review the specifics of the proposed legislation, we would like to address certain provisions that we anticipated may be included.

Misperceptions About the Retirement Plan Industry

The SPARK Institute recently completed a series of white papers entitled "The Case for EmployerSponsored Retirement Plans" analyzing certain aspects of the retirement plan industry including "Fees and Expenses", "Benefits and Accomplishments" and "Coverage, Participation and Retirement Security." These reports identify some important facts and dispel many myths about employersponsored retirement plans, particularly 401(k) plans.

Some common misconceptions are that 401(k) plans are not a "good value" for workers trying to save for retirement, and that the fees for plan and investment services do little more than erode workers' retirement savings. These criticism do not take into account all of the services that are provided to the plan sponsor and participants, including investment management. In fact, the data shows that plan participants receive more services and support and have more flexibility when investing through their 401(k) plans than they would if saving through retail IRAs. In addition, 401(k) plan participants may also benefit from sponsor-paid services, matching and profit-sharing contributions, and group pricing. And finally, recent studies show that on average, expenses for 401(k) participants are lower than the expenses paid by retail mutual fund investors.

There is also a misperception that service providers make too much money at the expense of American workers. Providing 401(k) plan services is capital and labor intensive and involves substantial start-up and maintenance expenses, especially in light of the ever-changing employee benefit legislative and regulatory environment. In fact, cost pressures are significant because competition is fierce. The industry has been consolidating over the past ten years as many providers were unable to maintain profitability. SPARK Institute data indicates that more than 60 companies have sold their businesses in the past five years, and more than 20 additional firms exited the record keeping side of the business during that period by outsourcing that function to third party service providers. The industry's pre-tax profit margin averaged 21% from 2005 through 2007, a period when the Dow Jones Industrial average was between approximately 10,800 and 13,400. However, the 2008 average pre-tax profit margin is estimated to be approximately 10%, and in negative territory for 2009, because of the market collapse. Another myth is that plan sponsors and workers do not understand the fees and expenses associated with their retirement plans because the information is not being adequately disclosed, or is not available. The vast majority of retirement plan and investment providers provide substantial, detailed and understandable information about plan fees and expenses to plan sponsors and participants above and beyond what is already required by law because they recognize that it makes good business sense to do so. It also helps them avoid potential misunderstandings and claims from plan sponsors, plan participants and regulators. In fact, a strong case can be made that it is a combination of simple human nature and the "do it for me" preferences of a significant number of American workers when it comes to retirement saving and investing—rather than the

lack of information—that is at the root of any lack of understanding. As these issues are considered, it is crucial that we all understand that plan sponsors and participants already receive and have access to a lot of information about plan fees, and that additional disclosures must be more useful, not just more information.

Discussion of Specific Proposals

Before I begin my comments about the specifics of the proposed Bill, I want to note that retirement plan and investment providers are already regulated by various agencies including the IRS, DOL, SEC, OCC, FINRA, and state insurance and securities regulators. Having multiple disclosure standards makes compliance very expensive and adds to the fees paid by plans and participants. The SPARK Institute supports a coordinated approach to regulating fee disclosure for retirement plans.

The proposed Bill requires that all service providers make detailed disclosures about plan fees and expenses in four categories. The SPARK Institute strongly urges the Committee to reconsider whether requiring disclosure to be made through a "one size fits all" solution using pre-determined categories is appropriate. Not all fees fit neatly into categories and no single form or methodology can adequately address the diversity of products and service structures without favoring one segment of the industry over others. Any statutory framework must be flexible and adaptable to the broad array of investment products and service structures, and must be able to accommodate the competitive and ever changing nature of the retirement plan and investment industries.

A. Disclosure to Plan Sponsors

With regard to disclosures to plan sponsors, service providers should not be required to calculate the actual dollar amount of fees and expenses, particularly those that are embedded in the expense ratios of plan investment options. Providing expense ratio or rate information, instead of dollar estimates, will provide enough information. Service providers can, upon request, provide simple estimates of the aggregate amounts of such fees and expenses based on certain assumptions and average account data. Much has been made of the debate over disclosure of fees in "bundled" vs. "unbundled" service structures. Unbundled providers argue that their products and services may appear to be more expensive to plan sponsors when compared to the same or comparable services that are offered through a bundled service provider. Bundled service providers argue that they may not offer component services on an unbundled basis, and do not have unbundled pricing or cost information available. Bundled providers add that any such unbundled pricing information is inherently arbitrary, hypothetical, unreliable, and potentially misleading. The SPARK Institute views this debate as a distraction from the real issue—the need to provide useful and relevant disclosures to enable plan sponsors to make sound fiduciary decisions. Plan sponsors will have their own preferences toward either bundled or unbundled product offerings, and have the ability and right to request information that they deem necessary in order to evaluate service providers. Similarly, service providers should have the ability to structure their products and services on an unbundled or bundled basis and price their products and services as they choose. Plan sponsors have the ability to request information from service providers and service providers have the option to comply with such requests in the hopes of winning new or retaining existing business. Market forces, industry best practices, the threat of litigation, and the threat of regulatory enforcement actions should drive industry behavior instead of legislative mandates. The SPARK Institute believes that ultimately the bundled versus unbundled disclosure debate is more about companies with different product structures, service models, product and service capabilities, and pricing structures debating about market forces and competition than alleged defects in disclosure of employer-sponsored retirement plan fees. The SPARK Institute does not believe that new laws and regulations should attempt to resolve this business debate.

B. Disclosure to Plan Participants

SPARK Institute members stand ready to assist plan sponsors in providing fee information to plan participants. As with service provider disclosure to plan sponsors, The SPARK Institute urges the Committee to seek a flexible and concept based framework, as workers will ultimately bear the costs of additional disclosures.

Instead of creating such a framework, the Bill anticipates an omnibus notice and fee chart addressing all the plan's investment options. The Bill's requirement that the fee chart categorize charges relating to plan investment options has the unintended effect of increasing burdens and costs without providing new or more useful data to participants. Categorizing fees by the way they are charged, which may have nothing to do with what they are for, will not help participants better understand them. With respect to a plan's investment options, participants should instead be

provided with information regarding the total investment fees (e.g., the expense ratio) and the transaction related fees (e.g., redemption fees). Providing participants with extra detail about how fees are broken down will likely confuse or overwhelm them instead of enlightening them.

The Bill also obligates the plan sponsor to provide dollar basis disclosures or estimates of indirect charges, such as fees that are embedded in investment products, for each participant on quarterly benefits statements. These charges, by definition, are embedded in the funds and the information needed for the calculations and estimates does not exist on the record keeping systems that produce the statements. Moreover, since the fund and account information is reported net of the embedded fees, adding this information to the statements will result in information that does not add up or make sense.

C. Other Requirements

It is our understanding that the proposal also includes a requirement that conditions ERISA 404(c) fiduciary liability protection on the inclusion of an index fund that meets certain subjective requirements. In our opinion, this precondition is effectively the same as a mandate, which is unprecedented under ERISA. The Bill's objective—increased transparency—does not warrant a specific fund requirement. We are also very concerned about the subjective nature of the fund description which requires the use of "an appropriate broad-based securities market index fund and which offers a combination of historical returns, risk and fees that is likely to meet the retirement income needs at adequate levels of contribution." Reasonable investment experts are likely to disagree on which funds satisfy such requirements. Additionally, as we have all been painfully reminded in recent months, past performance is no guarantee of future results. The subjective nature of the requirement makes it untenable and exposes plan sponsors to unnecessarily increased litigation risk. And finally, mandating the use of index funds as a potential "low cost" investment option as a way of reducing plan costs relies on the misconception that doing so will change the economics of servicing a plan. Regardless of which funds are used in a plan, plan service providers must have a source of revenue for the total package of services they provide.

Conclusion

On behalf of The SPARK Institute, I thank the panel for the opportunity to share our views on these important issues, and I welcome your questions.

[Additional submissions of Mr. Goldbrum follow:]

["The Case for Employer Sponsored Retirement Plans: Benefits and Accomplishments," may be accessed at the following Internet address:]

http://www.sparkinstitute.org/content-files/File/Benefits%20and%20Accomplishments%20FINAL%20April-09%281%29.pdf

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["The Case for Employer Sponsored Retirement Plans: Coverage, Participation and Retirement Security," may be accessed at the following Internet address:]

http://www.sparkinstitute.org/content-files/File/Coverage%20Participation%20and%20Security%20FINAL%205-4-09.pdf

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["The Case for Employer Sponsored Retirement Plans: Fees and Expenses," may be accessed at the following Internet address:]

http://www.sparkinstitute.org/content-files/File/Fees%20and%20Expenses%20May%202009%20FINAL.pdf

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714 Hopmeadow Street, Suite 3
Simsbury, CT 06070
(860) 658-5058

Robert G. Wuelfing, President
Larry H. Goldbrum, General Counsel

Via Electronic Mail

May 18, 2009

The Honorable George Miller
U.S. House of Representatives
2205 Rayburn House Office Building
Washington, DC 20515

The Honorable Robert E. Andrews
U.S. House of Representatives
2265 Rayburn House Building
Washington, D.C. 20515

The Honorable John Kline
U.S. House of Representatives
1210 Longworth House Office Building
Washington, DC 20515

Re: **401(k) Fair Disclosure for Retirement Security Act of 2009**

Dear Congressmen Miller, Andrews and Kline:

Thank you for the opportunity to appear before the Health, Employment, Labor and Pension Subcommittee (the "Subcommittee") on April 22, 2009 to share The SPARK Institute's views on fee transparency for 401(k) plans. We commend your efforts and greatly appreciate your willingness to consider our suggestions regarding a flexible and concept-based approach that will accomplish the goals of the Subcommittee.

As you requested during the hearing, attached is a brief summary of our suggested alternative approaches and concepts that will provide plan sponsors and participants with the information they need in a flexible, understandable and cost-effective manner. Additionally, this submission is intended to be responsive to the written request for additional information that we received from Congressman George Miller on May 6, 2009.

As I stated at the hearing, The SPARK Institute fully supports fee transparency and welcomes the opportunity to collaborate with the Subcommittee to produce the most effective legislation possible.

Accordingly, if the Subcommittee believes that our suggestions warrant further consideration, we welcome the opportunity to discuss them with you and your staff.

We thank you for your consideration of our views. If you have any questions regarding this information, please do not hesitate to contact me at (704) 987-0533.

Respectfully,

Larry H. Goldbrum
General Counsel

Enclosure

Memorandum

To: The Honorable George Miller, The Honorable Robert E. Andrews and The Honorable John Kline

From: Larry H. Goldbrum, General Counsel

Date: May 18, 2009

Re: **Suggested Alternative Approaches and Concepts for 401(k) Plans Fee Transparency**

This Memorandum summarizes The SPARK Institute's suggested alternative approaches on retirement plan fee transparency. As we noted in our testimony on April 22, 2009, The SPARK Institute fully supports fee transparency. However, we urged the Health, Employment, Labor and Pensions Subcommittee (the "Subcommittee") to consider a flexible, concept-based approach. Additionally, we urged the Subcommittee to consider the costs associated with any new disclosure requirements and the potential for litigation that could ultimately be more harmful than beneficial for plan participants.

Our suggested approach would ensure that plan sponsors and participants receive, or have available to them, effectively the same critical information that would be required under the currently proposed 401(k) Fair Disclosure for Retirement Security Act of 2009 (the "Bill"), and it will allow service providers to have flexibility, without favoring one segment of service and investment providers over another. Additionally, our members prefer our approach because it will be more cost effective to implement and maintain.

Please note that the following are summaries of concepts and are not intended as the proposed language of an amendment to the Bill. In many instances, the suggestions below are intended to be integrated with existing provisions of the current Bill (e.g., timing of participant disclosures), that are not restated below. As we noted in our letter that accompanied this Memorandum, if the Subcommittee believes that our suggestions warrant further consideration, we welcome the opportunity to work with you to develop them for inclusion in the Bill.

I. Service Provider To Plan Administrator Disclosures

A. Service Provider Compensation Disclosure Requirements – Any service provider that has a direct relationship with a plan and receives direct compensation or indirect compensation shall disclose or provide the following to the plan administrator.

1. The amount of any direct compensation and indirect compensation it receives in connection with providing services to the plan, or in connection with plan assets.
2. In the case of indirect compensation, the source of such compensation.
3. A summary of the products and services provided for the compensation.

B. Additional Investment Option Disclosure Requirements – Any service provider that has a direct relationship with a plan shall disclose the following information for each investment option offered under the plan with respect to which the service provider or any of its affiliates is the investment manager or distributor.

1. The investment management related fees and expenses.
2. All other non-investment related fees and expenses of the investment option, in the aggregate.
3. The aggregate fees and expenses of the fund (i.e., the sum of items 1 and 2).

A service provider may present the information required under B, 2 using additional subcategories.

C. Bundled Services – Any service provider that offers a bundled package of services shall, at the reasonable request of a plan administrator, provide to the plan administrator additional information regarding the fees for component services that are part of the bundled service arrangement provided, however, that the service provider shall not be required to provide such information if (1) the service provider does not, or would not, offer the component service or services on a stand alone basis to the plan or similarly situated plans or (2) the service provider determines that the exclusion or modification of the component service or services at issue will not cause it to change the bundled fees it charges to the plan for its services.

D. Presentation and Estimation of Charges – The disclosures required under this Section shall be presented as a dollar amount of the compensation, a representative estimate of the compensation, or a description of the rate, formula, methodology, or any reasonable description of how the compensation at issue will be calculated.

E. Definitions

1. Direct Compensation - The term "direct compensation" shall mean any compensation paid to a service provider directly by the plan sponsor, or from the plan or participant accounts.

2. Indirect Compensation – The term "indirect compensation" shall mean any compensation received by a service provider from any unaffiliated person or entity, other than amounts that are direct compensation.

Commentary – Under our approach, service providers must disclose any direct or indirect compensation they receive and summarize the services they provide. Among the crucial differences between the Bill and the approach that our members prefer is that our approach does not require a "one size fits all" solution using pre-determined categories. This addresses our concern that not all fees will fit neatly into pre-defined categories and that no single form or methodology can adequately address the diversity of products and service structures without favoring one segment of the industry over others.

Additionally, our approach resolves the "bundled" vs. "unbundled" service structures disclosure debate in a way that addresses the concerns of both sides of what we view as a debate between companies with different product structures, service models, product and service capabilities, and pricing structures debating about market forces and competition. Under our proposal, plan administrators that want to compare pricing of an unbundled arrangement with a bundled arrangement can do so by adding up the fees for services offered through the unbundled arrangement and comparing them to the fees for the same set of services offered under a bundled arrangement. However, bundled providers who do not, or will not, offer component services on a stand alone basis or unbundle their package priced services, will not be forced to disclose hypothetical information that would ultimately not affect their service or pricing arrangement.

II. Plan Administrator to Employee Disclosures

A. Advance Notice of Plan Fees and Expenses – The plan administrator shall provide the following information to participants.

1. Direct Transaction Fees and Expenses – Participants shall be provided with a summary of the transaction fees and expenses that may be charged directly against the participants' accounts. In the event that a particular direct transaction fee or expense is not included in the summary required hereunder, the plan administrator may satisfy this advance notice requirement by expressly notifying a participant of the particular transaction fees or expenses before the transaction that would result in such fees or expenses is initiated by the participant.

2. Investment Option Summary Chart

   (a) Participants shall be provided an investment option summary chart that discloses for each investment option offered under the plan: (i) the investment management related fees and expenses, (ii) all other non-investment related fees and expenses, in the aggregate, and (iii) the aggregate fees and expenses of the fund (i.e., the sum of items i and ii). The disclosures shall be provided as a percentage (e.g., expense ratio), and shall include a dollar estimate of the annual costs incurred on a $1,000 investment for each investment option. A service provider may present the information required under (a)(ii) using additional subcategories.

   (b) With respect to any investment option that is an "investment company," as defined under the Investment Company Act of 1940, as amended, the fees and expenses information provided to participants pursuant to Section II, A, 2(a) shall be based on the information included in the fund's most recent prospectus.

(c) With respect to any investment option that is not an investment company, the fees and expenses information provided to participants pursuant to Section II, A, 2(a) shall be based on the most recent fees and expenses percentage rate information provided by the investment manager, investment provider, or such other authorized representative of the investment option.

3. Other Direct Fees and Expenses – Any other fees and expenses that may be charged directly against, or deducted from, participants' accounts that are not disclosed in paragraphs 2 (a) or (b) shall be disclosed in a summary of such other fees and expenses, including an explanation of the methodology used by the plan administrator to allocate the fees and expenses among plan participants. Any amounts described hereunder that are charged directly against, or deducted from, participants' accounts shall also be disclosed under Section II, B, 1.

B. Quarterly Benefit Statements – The plan administrator shall disclose the following information about plan fees and expenses with each quarterly participant statement.

1. Direct Fees and Expenses – Each participant shall be provided on each quarterly statement the total dollar amount of the fees and expenses charged directly against the participant's account during the quarter.

2. Indirect Fees and Expenses

(a) The investment option summary chart described in Section II, A, 2 shall be provided to participants with each quarterly statement.

(b) On each quarterly statement, each participant shall be provided with a dollar estimate of the indirect fees and expenses paid by the participant with respect to each investment option, and an aggregate dollar estimate for all of the investments held in the participant's account for the statement period. The estimates shall be based on the ending balances of the investments held in the participant's account on the last day of the statement period, and the fee information described under paragraphs II, A, 2(b) and (c).

Commentary – As with service provider disclosure to plan administrators, The SPARK Institute members prefer a flexible and concept based framework that is cost effective. Our proposal is very similar to the Bill and provides participants with substantially the same information in a cost effective manner. In fact, it is possible that our approach is what the Subcommittee contemplated under the Bill. In such case, minor modifications to the Bill should conform the two so that it is clear that what we suggested will be acceptable under the new law.

One of the reasons our members prefer our approach is that it allows service providers to provide estimates of indirect charges, such as fees that are embedded in investment products (e.g., mutual fund expense ratios), on participants' benefits statements rather than calculate

the charges. This is a significant issue that would be very costly to resolve because the charges, by definition, are embedded in the funds and the information needed for the calculations and estimates does not exist on the record keeping systems that produce the statements. Moreover, we note that requiring intermediaries to calculate the amount of embedded indirect fees on participants' benefits statements would require more disclosure by intermediaries than the funds are required by the SEC to give to direct investors. For example, mutual funds are not required to calculate for retail investors the actual dollar charges paid indirectly by investors for investing in their funds.

The concepts described herein for the investment option summary chart and participant statements are depicted in the attachment hereto.

* * * * *

We commend the Subcommittee's efforts and greatly appreciate your willingness to consider our suggestions. We look forward to the opportunity to discuss these matters with you.

THE SPARK Institute, Inc.

ATTACHMENT TO MEMORANDUM TO
THE HONORABLE GEORGE MILLER,
THE HONORABLE ROBERT E. ANDREWS AND THE HONORABLE JOHN KLINE

MAY 18, 2009

Sample Participant Investment Options Summary Sheet

ABC PLAN INVESTMENT OPTION SUMMARY				
	A	B	C	
Name	Investment Management Fees	Other Fees and Expenses	Total Investment Option Fees and Expenses (A+B)	Annual Cost Per $1,000 Invested
Fund A	0.75%	0.25%	1.00%	$10.00
Fund B	0.25%	0.25%	0.50%	$5.00
Fund C	0.60%	0.10%	0.70%	$7.00

Note: This summary sheet would be a plan level insert that would be provided with quarterly statements. The data shown is the minimum required information about fees that are embedded in investment options, including record keeper wraps. Service providers would have the flexibility to provide additional information (e.g., return information) and legal disclosure as needed or required by the investment provider.

Sample Disclosure of Participant Paid Direct and Indirect Fees and Expenses

Quarterly Statement for Participant A

	Beginning Balance	Contributions	Distributions	Investment Gain/Loss	Fees and Expenses	Ending Balance
Fund A	$6,000.00	$60.00	$0.00	$30.00	-$2.00	$6,088.00
Fund C	$4,000.00	$40.00	$0.00	$20.00	-$1.00	$4,059.00
Totals	$10,000.00	$100.00	$0.00	$50.00	-$3.00	$10,147.00

Estimated Investment Options Related Fees and Expenses		
	Ending Balance	**Estimated Quarterly Fees**
Fund A	$6,088.00	$15.22
Fund C	$4,059.00	$7.10
Total	**$10,147.00**	**$22.32**

Note:

Direct fees and expenses are disclosed in green highlighted cells.

Indirect fees and expenses are disclosed in yellow highlighted cells. The concept shown in the yellow cells would be added to quarterly participant statements. The calculation is based on the ending balance using the most recent expense ratio information from the investment provider prorated on a quarterly basis. This would be the minimum required and each provider could add to this, including legal disclosures.

Chairman ANDREWS. Well, thank you, Mr. Goldbrum. We are happy to have you with us.

And I would like to thank each of the witnesses for excellent contributions to the committee's understanding of the issues.

We are going to begin with questioning—with Chairman Miller—for 5 minutes.

Mr. MILLER. Thank you very much.

And thank you for your testimony.

This hearing and, I believe, this subject matter, is absolutely critical. And I think your testimony validates that point of view.

The financial-services industry likes to remind us that American households own a piece of the market; that more people own stock

today than at any other time. The vast majority of them own less than $10,000 worth of stock, and they own it primarily through their 401(k) plans or a related plan.

That nexus to the stock market is a great deal with the stock market is going up. Nobody on this committee is suggesting that, somehow, this money was lost because, solely, of these fees. But what it pointed out is that, in a volatile market, with unprecedented events taking place—that you need to be able to hold on to every dollar possible.

And when we see how fees can erode the savings of individuals, I think it is very important that we see that we can secure for them every dollar possible, since they are working very hard, after paying all of their bills, to set aside money to save for their retirement.

And if you talk to individuals, you will see—in one market drop that was engineered by financial scandals, we see that people could lose their health savings account, their kids' education, and their retirement—all in one drop from the market.

And so the question of, "What are they left with?" and "What is the net that is provided to them after they make these investments?" is very, very important.

I know we can all talk about how complicated it is, and, "They won't need it," and, "They won't like it," and, "They won't understand it." But the fact of the matter is the effort hasn't been made to give it to them today, so we don't know that.

And if I go to Mr. Bullard—if I understand what you are saying on pages 14, 15, and, I believe, 16, in your opening statement—is this information is available. It is just not in a place where it is very useable to the individual, or maybe even the plan sponsor, in this case, because of the manner in which it is scattered about in the various reports that are required today, under the law?

Mr. BULLARD. Right. That is correct. And it is a very important point.

Most of the table has been focusing on the bundled-unbundled issue. But there is a—a prior issue of just being able to give participants a number so they can know what their total, all-in costs are, and, I would hope, also provide that as a dollar amount so, as the ranking member pointed out, they can evaluate that $300 for themselves, and decide whether that is something worth paying.

Mr. MILLER. And you believe that that is information that they can absorb, and make a decision based upon?

Mr. BULLARD. Ideally, what you would do is you would have an all-in expense ratio. And, then, to amend the bill's comparative-fee components—to provide that, next to that, there be a representative fee for that size 401(k) plan. By putting the fee in context, then you are really allowing basic capitalist principles of competition to work in this marketplace, and let them evaluate whether it is worth paying more, if that is the case, than the average fee.

The ICI just released a study which shows that it seems to be comfortable with there being representative fee amounts out there that it characterizes as "average" for different size plans. I see no reason why that shouldn't be placed alongside that very simple one expense ratio that are provided to participants.

Mr. MILLER. Thank you very much.

Ms. Mitchem, you raised a point that has been raised somewhat in this committee, but a little bit more on the Senate side. And on page seven, when you discuss organizing funds around risk levels, as opposed to sort of consumer names, with the life cycle, safe and secure—what is the other one they were looking—had another one in the Senate that they had a problem with—target funds? What we find out is, when they looked at these funds that are advertised under the same consumer heading, they are, in fact, very different in terms of risk.

And there is very—apparently—somewhat difficulty in consumers determining how that risk is managed. Do you want to speak to that?

Your mic, please?

Ms. Mitchem, if you could turn your microphone on—thank you.

Ms. MITCHEM. I think it is important to recognize the challenges that participants face in really becoming their own chief investment officers. Most of them don't have a background in finance, and have an extraordinarily difficult time deciding how to allocate their funds in the most appropriate manner.

So I think what we have to do is to make it easy for them; to make investing in their 401(k) plan not a difficult challenge. And one of the ways that we can do that is by demystifying the vocabulary.

So, instead of talking, you know, about small-cap equity and large-cap equity and high-yield bonds, we could actually put these funds on a risk spectrum between "conservative," "moderate," and "aggressive." And those are words that the average participant can——

Mr. MILLER. But you have to admit, you started out by saying that the whole marketing ploy here is that, somehow, you can beat the Street. So if you don't use the language of the Street, how could you possibly beat the Street?

So if you don't understand large-caps, small-caps and all the rest of that—I mean, it is a fallacy of the plan. 85 percent of the trained traders on the Street can't beat the Street. So—but we are convincing Americans that they can.

But I think you—I have a limited time—you—I am about out of my time. I am out of my time. But I am chairman of the committee, so I am going to take another minute.

I think this is a very important point that you are raising, about how these—again, this is marketed to individuals.

But I want to, quickly, go to Ms. Borland.

One of the concerns I also have is what happens when people exit these plans—a lot of discussion here about getting them in and automatic enrollment, and all the rest of that. What happens when they exit?

We went through a huge scandal here with lenders in the student-loan program, who used that program to develop a market for people for private—"private"—student loans. They were just simply credit cards.

And the arrangements that they—you know, people started putting their trust in those individuals, and then they got marketed off into very high-interest loans.

You are suggesting here that there is a financial advantage in some of the affinity arrangements between these funds and their other products.

You want to take 30 seconds? And I will get back to you "off the air," as they say.

Ms. BORLAND. Okay. Yes, it is something that is very important.

When individual investors within a 401(k) plan have the purchasing power of 1,000 or 10,000 or 20,000 investors, they can expect lower fees. When they roll over into that retail environment, they have the purchasing power of one individual.

We are not suggesting that rollovers are a bad thing. And, in many cases, they may be a very smart decision; certainly, significantly better than cashing out.

However, there could be a significant fee differential. And there is no requirement that those be effectively disclosed. So when a service provider for a 401(k) plan has incentives to encourage rollovers into retail products, we think the plan sponsor needs to be adequately aware of that potential conflict of interest, and be aware of the marketing that may be taking place by the service provider, directly to plan participants, and ensure the appropriate disclosure is in place.

Mr. MILLER. Thank you.

Thank you, Mr. Chairman.

Chairman ANDREWS. Thank you, Mr. Chairman.

The gentleman from Minnesota, Mr. Kline, is recognized.

Mr. KLINE. Thank you, Mr. Chairman.

We have had a number of off-line, sidebar discussions, here, about the importance of lawyers and the legal profession.

We differ, often, on the importance of that. But I think it is important that, when we are looking at legislation—that the principal purpose not be just to grow the legal profession; to make things complicated; to write legislation in such a way that you are bringing about more causes of action, more lawsuits. And I suppose, as I mentioned before, in some districts, we can expand law schools. But that shouldn't be what our principal purpose is.

So, Mr. Chambers, I want to turn to you. You, in your testimony, had a great deal to say about fiduciary-liability issues. And, as you know, when we took this bill up in the last Congress, I offered an amendment that, in effect, said, "If a plan sponsor did what the bill says it was supposed to do, it would be shielded from a lawsuit."

It turns out I withdrew the amendment on the understanding that, as the legislation went forward, we would continue to discuss that. The legislation didn't go forward. And so we didn't proceed with that.

Can you just take some of my time here, or—now, I am making it your time to tell us what sort of protection needs to be included in this bill? And how can we go about making sure that that is taken care of?

Mr. CHAMBERS. Thank you.

Mr. KLINE. And I understand I am asking lawyers, so there is some risk here. But——

Mr. CHAMBERS. Well, I was going to point out that lawyers have 401(k) plans, too. So there has to be something to go into that.

I am sorry?

Chairman ANDREWS. We have nothing in them.

Mr. CHAMBERS. Absolutely.

As I said, the American Benefits Council and, I think, most employer organizations, are fully in favor of increasing the transparency of plan fees, and of the operation of plans. There is no question about that.

The concern here is that as additional responsibilities are being placed on employers to collect information, and then disseminate information, we are concerned that that itself is going to increase their potential for liability.

So one of the things that we have suggested, as I mentioned, both in the written testimony, and in my oral testimony, is that in several different situations, we think that it is appropriate to provide those employers who act in good faith and—whether there are small mistakes in terms of, you know, 27 basis points being charged, as opposed to 32, or whether they are given information that, ultimately, is incorrect, by a service provider—that the legislation should provide those employers with coverage—in other words, with limited or no liability.

Mr. KLINE. And that would—excuse me, if I can. You have seen the legislation, at least as it was last time. And you are suggesting that we do need to put language into it—we do need to amend Mr. Miller's bill to make sure that there is that protection.

Mr. CHAMBERS. That is correct.

Mr. KLINE. Okay.

You also talked about strike suits. Tell us a little bit more about what those are—defining the term. What is their purpose, and how do we need to address that in the legislation?

Mr. CHAMBERS. Well, I don't know that the term "strike suit" is something that you are going to find in Webster's Dictionary, but——

Mr. KLINE. We will take your definition.

Mr. CHAMBERS. Oh, thank you.

Actually, it is the definition of some of the litigators at our firm, because I asked them if there is a more appropriate term, and they said, "No."

A strike suit is a suit which is difficult to describe in saying, "Well, this was clearly a strike suit, as opposed to that one," because it is a matter of intention.

A strike suit is——

Mr. KLINE. What is the purpose of a strike suit?

Mr. CHAMBERS. Well, the purpose is, essentially, to try to get a settlement in connection with a cause of action. And the way that a lot of class actions and other suits that are brought in connection with employee benefit plans are operated is that, you know, a complaint is filed, and then there is a motion to dismiss by the defendants.

And a lot of defendants—typically, employers and service providers—recognize that if a class gets passed in motion to dismiss part of the program, then, in fact, there is going to be a lot of additional expense.

And so these are cases in which the theory is, if we can get past—if the plaintiffs can get past the motion to dismiss, at that point in time, there is a very good opportunity for settlement, with-

out actually having to take the case to its regular conclusion, through the court system.

And, of course, those are cases, as I mentioned in my oral testimony, which lead to, again, feathering not only plaintiff's lawyers—I mean, you know the——

Mr. KLINE. Both sides get paid.

Mr. CHAMBERS. Both sides are represented.

And——

Mr. KLINE. Twice as many law schools.

Mr. CHAMBERS. And an awful lot of the money goes into lawyers' pockets, and that is unfortunate, because—and it has an adverse impact on the amount of contributions made to the plan, services, et cetera.

Mr. KLINE. All right. Thank you. I see my time has expired.

I yield back.

Chairman ANDREWS. I thank my friend.

I thank the witnesses for very edifying testimony. And I want to kind of walk through some of the concerns that we have heard about the underlying bill.

One objection, or issue, raised by the minority side, was that maybe this isn't that big of a deal. Well, small amounts of money, compounded over time are a very big deal. And if someone is overpaying for fees over a 30-, 40-, 50-year period in their life, it metastasizes. It becomes a lot of money.

The second concern—Mr. Chambers, I think we have the same goal. The purpose of this bill and the investment-advice bill is not to expand employer liability. It is to expand protection for consumers and investors and retirees. So we are interested in hearing from you on a continued basis, of how the bill might be improved, in conjunction with the minority, on these issues. I think you have raised some significant questions this morning.

Mr. CHAMBERS. Thank you.

Chairman ANDREWS. I heard some concerns—and I am paraphrasing—but that bundling is too much of a problem for providers.

Ms. Mitchem, Barclays is a pretty large provider, isn't it?

Ms. MITCHEM. Yes.

Chairman ANDREWS. Do you have any difficulty unbundling any fees that you would charge to a client?

Ms. MITCHEM. Well, I think, importantly, we are not a recordkeeper. So we are an asset manager only. So we don't provide what would be called the tradition bundle, where we bundle administrative fees with investment-management fees.

Chairman ANDREWS. Right.

Ms. MITCHEM. But I would say that if you look across the 401(k) industry, there are very few providers that offer only a completely bundled package. So what you will find is that in the "bundled" category, the majority of those players are what you might consider "partially bundled." So they offer a couple of outside options, but the majority of it is a proprietary——

Chairman ANDREWS. Would you agree or disagree with the statement that the unbundling requirements in the bill are punitive or too burdensome for a provider?

Ms. MITCHEM. You know, I don't think they are punitive, because I think, when you ask a question, and you dig deep, I think plan sponsors do get the answer. And I think that, obviously, the work of Hewitt would support that. So we find that when plan sponsors go out for bid, when they actually press the provider to get that information, they both get that information and end up, in many cases, lowering the overall fees of the plan.

Chairman ANDREWS. The Adam Smith idea, as Mr. Bullard talked about—more competition—it tends to work.

Ms. MITCHEM. Also, just making it easier for plan sponsors to get that information. I mean, they shouldn't have to perform a forensic exam to get the information that they need to make the most appropriate fiduciary decision.

Chairman ANDREWS. Mr. Onorato, another criticism that we have heard is that the information that would be presented under this bill is too complicated for either employers, or employees, or both to understand. Do you agree with that concern?

Mr. ONORATO. Mr. Chairman, absolutely not.

The independent providers have been disclosing plan fees and participant fees for the last 20 years. It may not be in the template recommended by the bill, but we exist because we can provide cheaper service, and better availability of investment direction, and we disclose our fees.

It is absolutely not true to suggest that a small 15-employee company would have the leverage to go into a bundled investment firm and ask for full disclosure of record-keeping fees.

The testimony given was, "This is provided when client retention is an issue."

The plumbing contractor at Ford Trucks cannot go in to a big, bundled provider and say, "I would like to know what I am paying for the call center or the ad men and the plan setup."

Chairman ANDREWS. Right.

Mr. ONORATO. Not going to happen.

Chairman ANDREWS. Mr. Goldbrum, and I will just conclude with you, because my time is about to expire. You graciously put the light on several minutes after I began, but I am not going to—I will play by the rules everyone else does.

No, that is right. Well, my dear friends would not let that happen.

Mr. Goldbrum, if a employee—if that plumbing contractor—Joe the Plumber, let us call him—goes to his or her financial-services firm that has set up the 401(k) and says, "Why are you guys taking a point and a half a year out of people's accounts, and what is it for?"—do you think he has the right to know the answer to that question?

Mr. GOLDBRUM. Yes, I do think that——

Chairman ANDREWS. Do you think that we have to provide it by statute, or do you think the market is providing him with an answer now?

Mr. GOLDBRUM. Well, I think that the vast majority of service providers are already providing a significant amount of information to employers to help them evaluate the fees that are being paid for their plans, and to help them satisfy their fiduciary requirements.

So where you have a provider that is providing a full suite of services, and the fees are being paid, for example, through the investment fund, the simple answer is that the fees are the total expense ratios of the fund. What are the total costs of the funds?

Chairman ANDREWS. You are aware, though, of the market research of—both among small employers and employees that say most people have no idea what these fees are being paid for. Why is that?

Mr. GOLDBRUM. Well, I think that it is important to separate what employers, as plan fiduciaries, need to know, and the decision process that they go through in picking the funds and setting up the plan—versus what the participants need to know in making their investment decisions.

Chairman ANDREWS. Shouldn't participants have the right to know whatever they want to know, because it is their money?

Mr. GOLDBRUM. Again, the vast majority of service providers are providing substantial information——

Chairman ANDREWS. But, no; that wasn't my question. If Joe is an employee of the fund, as well as the owner, shouldn't he have the right to know where every dollar of his pension money is going?

Mr. GOLDBRUM. Absolutely.

Chairman ANDREWS. Okay.

Mr. GOLDBRUM. We are not against fee disclosure. Our issues are really in the manner and the approach——

Chairman ANDREWS. Okay.

Mr. GOLDBRUM [continuing]. And the specific details of how—approached.

Chairman ANDREWS. I appreciate that. Thank you very much.

Mr. McKeon is not here, so it would be Dr. Roe?

Dr. ROE. Thanks, Chairman Andrews.

First of all, obviously, Vanderbilt is very well represented here today. And I am pleased to say, 2 weeks from Friday, my son gets his MBA from Vanderbilt. So I am—halleluiah. That is the last one, I think.

Ms. BORLAND. Congratulations.

Chairman ANDREWS. Yes, but how is their football team?

Dr. ROE. Well, not bad. Not bad.

Chairman ANDREWS. He didn't go to law school?

Dr. ROE. No. No, he did not go to law school.

Chairman ANDREWS. Okay. All right.

Dr. ROE. I appreciate you all being here, and trying to work through this. In the medical group I practiced in, we had 70 providers and about 350 employees. And I had the fortune, in good years, to be on the pension committee, and, this last year, the misfortune of being on the pension committee when prices—I mean, the assets were going down.

And I think fee transparency is extremely important. It is very hard, sometimes, even in my position on the pension committee, to figure out how much money we will pay in to have the plan administered.

However, in my own personal account, I will use a bundled approach many times. I do, currently, because I think you have aligned incentives. I could look at my account and say, "I made or

lost this much." I can certainly compare that to the market, and make a decision.

I know exactly how much I am paying each year. And I think—I forgot who gave the example—if it goes from $1 million to $2 million—okay—that you paid more money. That is correct. But if that beats the market average, I have no problem with paying for that advice.

And if it is good advice, and my return, net of fees, is higher than the market average, I am happy with that. I don't mind paying for that at all.

And I will stop, and then get your comment on that. I had forgotten you had made that statement.

Mr. ONORATO. Thank you. That is a very good point, Congressman.

It comes down to freedom of choice. You choose not to be interested in more than the all-in fee. That is what you have said. If you are a firm that wrote software for call centers, or provided call-center services, or you were a CPA firm, you would be fully qualified to produce your own 5500 and file it. Or you may elect to choose to support the call centers of your participants.

Those firms need the choice. They need to sit down with the bundled provider and say, "I want to know, out of that 125 bits, how much that administrative unit charge is, because I might be able to do it cheaper."

We exist because, over time, we have proven we can do it cheaper by disclosing fees. Fees generate innovation. It generates better service for the ultimate participant. It comes down to freedom of choice.

Dr. ROE. Okay. Thank you.

I know that we spend a lot of time and money on, certainly, complying with ERISA. And I would just like a comment from any of the panel—do you think this will add any costs by doing this? Will this make this harder to comply with, or less hard to comply with?

Mr. ONORATO. Are you asking me again?

Dr. ROE. Just anyone on the panel.

Mr. GOLDBRUM. Yes, I would like to make a comment about that. I think that you run the risk that if you don't take a measured approach, and you simply provide a lot of additional information and more detail, simply for the sake of providing that information, it will, ultimately, increase the cost. And those costs will, ultimately, be passed on to the participants.

So I think you need to do a cost-benefit analysis here, in terms of what information is truly targeted and truly beneficial, and will help participants make more informed decisions, and what will it cost to provide that information, and weigh that.

And that is, ultimately, where we have concerns with the proposal, not in making fees transparent. We do support that; but more specifically, the approach that it is taken in how those fees are mandated to be disclosed.

Dr. ROE. Well, then go ahead and—with Chairman Andrews—just to have his question a minute ago—certainly, at the end of a year, when you look at your report, or a quarterly report, it would be simple for the people in my office, for instance, to just look and say, "I paid $400 this year to have my plan administered, and I

made such and such percentage of gain." I think that is what his point was.

And that is really easy to look at. It is difficult to look at—I mean, I have got through organic chemistry. And figuring some of these fees out is difficult to do. And so I think just having it transparent is important. Any comments from that?

Mr. GOLDBRUM. Yes, again, we agree that transparency is important. Again, it is the manner in which you go about doing it. So part of what we say is that participants should be given the right information. They should be able to have the total cost of what it is to use a particular investment option, so that they can make those comparisons.

And, absolutely, that information is available, and can be provided. And the vast majority of service providers and plan sponsors already provide that information through fund fact sheets, through the Internet, through call centers. The participants can get that information.

And granted, a fund summary would be better. And the vast majority of service providers, as I said, recognize that, and do provide that.

Dr. ROE. Thank you, Mr. Chairman.

Mr. BULLARD. Could I add something to that?

Chairman ANDREWS. Sure. I just want to make one point, and then we will let that happen.

I appreciate the doctor's line of questions. I would invite you, Mr. Goldbrum, if you would—the committee would like to see your organization's proposal as to what would work for fee disclosure. We would welcome you to submit that, so we could consider it.

Mr. GOLDBRUM. I thank you for that opportunity.

Chairman ANDREWS. Thank you.

Mr. Bullard, did you want to——

Mr. BULLARD. I would just like to add just two points. One is that the purpose of disclosure should be to drive competition and force down fees that way. And I think it would—the more that you get that at the level of the participant, the more you will have that effect, because that is where you have got the market, and that is where you have got the competition going on.

But I would also like the committee to keep in mind just the inevitable cost of 401(k)s, no matter what kind of legislation you adopt. And I was at a meeting of my child's very small school in Oxford, on Monday, where we were presented with the costs for a startup plan. And even at very, very low costs, that was going to run about 2.3 percent for those teachers, who are not making much money in the first place.

And if they expect to get a return of maybe 7 percent or 8 percent over their lifetime, essentially what they are coughing up to fees is a quarter of that. As an alternative, they could simply do a payroll deduction, go into a low-cost index fund at 0.18 percent, for example, and pay about less than one-tenth of the fees, and get, generally the same tax-deferred benefits you can get in the 401(k) plan.

So we have a much broader question here, which is——

Chairman ANDREWS. Thank you.

Mr. BULLARD [continuing]. Extremely costly 401(k) structure.

Chairman ANDREWS. Thank you very much for the questions, and also the answers.

Mr. Hare is recognized for 5 minutes.

Mr. HARE. Thank you, Mr. Chairman.

Mr. Bullard, just a couple of questions for you. How do we reestablish, in your opinion, the integrity of our retirement structure? Can disclosures and the elimination of hidden fees do it alone, or—or—or what else do we need to do here?

Mr. BULLARD. I could interpret that pretty broadly. And when you ask a professor a pretty broad question, you are certainly taking a risk.

It kind of goes to the point I just made at one level, which is that we currently have a Social Security system that is not actuarially going to survive. And we have a private defined-contribution plan that continues to grow and, essentially, squeeze out Social Security as being anything other than, ultimately, a welfare program.

So, in that light, if you look at that leg being in the private defined-contribution model, what we should be moving to is to eliminate the requirement that you have to do that through an employer altogether, and have one account where persons put their tax-deferred savings on their own, through payroll deduction.

If you want to exercise control over what they do that, because of the tax benefit they are getting, you do it through that one standardized account. A huge amount of the costs that are associated with our defined-contribution system, be it 401(k), 403(B), or other, is that we have these tax filings.

We have got the Form 5500. And it is all because it is done through an employer who is, really, a completely unnecessary intermediary. So the first step would be to have, let us say, lifetime savings accounts that not only are covering all of the tax-deferred options for which you can invest and not pay immediate taxes, but also see them as a vehicle through which, with payroll deduction, you could slash 401(k) fees to a tenth of what they currently are—not something the financial-services industry would like to hear, especially 401(k) providers. But that is, ultimately, where you would want to go if you wanted to save some real money.

Within the 401(k) context, what I discussed before is really, I think, the major step that we need to take. Whether our fees are unbundled or not, we should be able to give market participants a number, and then a context within which to place it, so if they don't like it, they can demand to get it reduced.

Mr. HARE. Well, what options do plan participants have when they find out that they have been hit with these hidden fees?

Mr. BULLARD. Well, one option is to go outside the 401(k) plan. And there are lots of 401(k) plans that, even with the tax deferral, they would be much better off not investing. Now, that is putting aside the match.

Whenever there is an employer match, you are virtually always better off. But if you ignore the match, because of the current cost structure of a lot of these plans, you are better off not even investing in one, and going with either a tax-managed or a passively managed fund outside in an IRA or a Roth IRA.

Mr. HARE. Thank you.

This is for Ms. Borland and Mr. Onorato.

We heard last year, when we were taking up this bill, that several employers' financial services argued that participants would—you know, I know Mr. Miller talked about this. The chairman talked about—"too much information to plan participants." And it could even stop participations.

Based upon what you hear from the clients—you know, I know this may be repetitious, but I wanted to make sure I got this straight—is this really a concern? Or do you believe that the sponsors and the participants, A, want the information; and, B, how do you determine how much information the participants can absorb for the disclosure to be useful for them?

Mr. ONORATO. Ms. Borland, be my guest.

Ms. BORLAND. Okay.

Based on conversations with clients, clients would appreciate guidance with respect to what works and what is effective. I think they sense that their employees do want more information. And they are looking for help, and the best ways to provide that information in a way that is understandable, and a way that works.

It may have been you, Mr. Andrews, who said this earlier—we haven't actually done this before in a consistent way. So, today, we don't know exactly what is going to work, but we need to try something.

We are in the process of doing some research to get some more ideas and guidance about what is most effective to employees. Once we have that, we would be absolutely pleased to share it.

But more information is clearly needed. I think our clients are open to providing more information, but they are looking for help and clarity with respect to what that information needs to be.

Mr. ONORATO. Congressman, I would add that I believe what has been proposed in this bill is just three buckets, is all we need to do.

There has been a lot of commenting about, as the size of a plan goes down, the expense goes up. But it is always a mathematical formula associated with the assets in the plan. 70 percent of the 2,000 plans a year that I acquire as a business manager are startup plans. They have 15 employees—20,000 people a year did not have a company-sponsored pension, may have no pension of any type.

The charge for that startup plan—a Safe Harbor plan—in my company is $600 plan fee, and $36 per participant. We disclose it to the sponsor, and we disclose it to the participants.

If we divide that by zero assets, it is a pretty high basis-point calculation. They contribute an average of $4,000 a year. One hundred thousand people with no pension plans started pension plans with my company in the last 5 years—$600, and $36 a participant. It is not expensive.

Mr. HARE. Thank you, Mr. Chairman.

Chairman ANDREWS. Thank you, Mr. Hare.

The gentleman from Connecticut, Mr. Courtney is recognized.

Mr. COURTNEY. I thank Mr. Chairman. And thank you for holding this hearing, which, I think Ms. Mitchem's comment, and her testimony that people still are sticking with defined-contribution plans—that demonstrates why we have to get this right.

Because, for better or worse—and it has been worse lately, obviously—but, you know, we have got to have a system that people have confidence in, which, you now, some people have made allusions to the fact that we certainly can't blame fees for the downturn in plan value. But on the other hand, if we are going to recover confidence in the system, which I think everyone understands is really, fundamentally, what we have to do with this economy, then we have to have a system that is credible, and that people believe in.

Get to the question of cost, which Mr. Goldbrum raised—sort of a, you know, possible concern that what we are doing is actually going to raise costs.

Ms. Borland, your testimony, which you had to summarize, actually did a nice job of showing specific examples of company X, Y and Z—of how better disclosure actually drives down costs. And, again, for the benefit of those who don't have your testimony, you showed how companies could save millions, actually, because of the benefit of disclosure.

And I guess what I want to be clear about is, in your opinion, does this bill sort of enable companies to really have tools to negotiate better prices?

Ms. BORLAND. Absolutely. This bill enables the apples-to-apples consistent comparison across different types of arrangements, in order to make better decisions.

Mr. COURTNEY. And, again, the companies that you cited as examples—to get to the point where they could negotiate intelligently with their providers—I mean they actually had to hire consultants, in some instances.

Ms. BORLAND. They did. And that is one of the challenges. Right now, it is so hard to get there, you—large companies have the sort of buying power to push and force providers to provide that information. Absent that buying power, companies don't have the ability to do that.

And in addition, even the most sophisticated companies generally need outside help to figure out all of the information, to pull it together.

It is not always the provider is giving it welcomingly. There is implied fees that have to be discovered within those structures to be—the bill would provide the consistency and the clarity needed, with respect to the information that should be disclosed.

Mr. COURTNEY. So, for the small business that has got four or five employees, like my old law firm, a couple years ago, you know, rather than having to go out and incur the expense of a consultant—actually having it by operation of law, that these fees would be disclosed—then you would be able to decide whether or not, "Hey, you know, I am not getting a good deal, here. It is time to shop around."

Ms. BORLAND. Exactly. It would facilitate better comparison.

Mr. COURTNEY. There is another issue, which has been raised with prior questions—is the issue of exposure to litigation. And I am sure everyone believes that no one should be the target of frivolous litigation.

I guess the question I have, though—because I was sort of flipping through the bill again, just to sort of see whether or not this legislation somehow adds to exposure to employers.

Mr. Bullard, I don't know if you have any comment in terms of whether or not—again, just this statute, or this proposed legislation, by itself—somehow aggravates that problem or—because it seems like the obligations it is creating is on investment plans, not on employers.

Am I reading it right or wrong?

Mr. BULLARD. Yes, ultimately, it will go, to some extent, to the selection of the options. And any informational requirements will go to their responsibility to select options prudently.

In litigation contexts, as was discussed, that is a question of whether you can get past a motion to dismiss. And the issue of the motion to dismiss is whether the Safe Harbor, under ERISA, is going to be available to the employer, with respect to the decision they made.

About 6 months ago, it was fairly clear—at least I think—that the decision made by the employer would include these kinds of factors. The law is now in flux because a couple of appeals courts have suggested that once the employer has picked, essentially, reasonably allocated options—that there is no more fiduciary duty.

I think that will eventually be reversed by the majority of courts.

But that is going to be the issue.

So, essentially, the legislation, as currently written, fits into the Safe Harbor structure. Where there is a liability issue is going to be the clarity with which the Department of Labor explains exactly what employers have to do within that Safe Harbor. And that is what causes the strike suits.

It is the lack of clarity in the law. And it allows frivolous litigation to find its way in with justifiable litigation, because of the lack of clarity in the guidance.

But, ultimately, you have to leave that to a more detail-oriented body. I think that, as the legislation is written, you have got your Safe Harbor.

I, really, have no objection to Mr. Chambers' lists of requests. I think none of those really raise any significant issues from a participant's point of view. But, ultimately, on your question, it is going to be the Department of Labor's guidance under that Safe Harbor that is going to drive how much frivolous litigation there is.

Mr. COURTNEY. All right. Thank you, Mr. Chairman.

Chairman ANDREWS. Thank you.

I think, Mr. Chambers, you wanted to weigh in on that. Would you maybe like to do that?

Mr. CHAMBERS. Well, I wanted to weigh in until Mr. Bullard was so complimentary of all the things that I had suggested.

Chairman ANDREWS. So you can just say, "As a matter of law, he was right."

Mr. CHAMBERS. But, if I could—I think, Mr. Courtney, the—he went beyond, in his response, the real answer to your question, which is, you know, "What does this bill mean to employers?"

And I must say, you know, employers are largely above the fray in connection with the bundled versus the unbundled.

Chairman ANDREWS. Right.

Mr. CHAMBERS. Yes, they have responsibilities that are a result of that, but, by and large, as Mr. Goldbrum suggested, I think that is a business decision.

And as Mr. Onorato suggested, the one thing—well, actually, one thing he didn't suggest is that if, in fact, a bundled provider makes available an opportunity to say, "Yes, this is how we whack up the fee that we charge you," the next question is, "Well, if we can get the 5500 for a cheaper price elsewhere, how much does that reduce our bundled fee?"

And the question, often, is, "It doesn't." All right? It is a bundled fee. We provide this set of this package, these services. Here is the list of services. I don't know that, necessarily, you are going to wind up being able to use that information to do the apples-to-apples analysis that we were talking about before.

But I do think that the employer needs to be protected. This is where we were going. What this bill needs to do is that as it adds additional responsibilities to employers to assemble information, distribute that information both to the government and to participants, and to analyze its own fiduciary responsibilities, it needs protection in connection with a good-faith effort to fulfill those responsibilities.

Chairman ANDREWS. Thank you, Mr. Chambers.

Thank you, Mr. Courtney. We appreciate that.

We are going to turn to Mr. Kline, for any concluding remarks he may have.

Mr. KLINE. Thank you, Mr. Chairman. And I will be brief.

I just want to say thank you. This is a terrific panel of experts. Even though many of you are lawyers, it is, really, a terrific—it is a terrific panel. And we thank you very much for your testimony and for the answers to the questions.

And I thank you, Mr. Chairman. I yield back.

Chairman ANDREWS. I thank my friend from Minnesota.

I would like to thank both the majority and minority staff for their work in assembling this panel. I concur with my friend's evaluation of the quality of your input this morning.

The subcommittee will be considering your testimony in conjunction with the full committee, and moving forward with our discussion both of fee disclosure and qualified independent investment advice.

And just to reiterate a couple of cleanup items—without objection, I would ask that the letter from the American Association of Retired Persons, dated April 22, 2009, be entered into the record.

[The information follows:]

April 22, 2009.

Hon. ROBERT E. ANDREWS, *Chairman,*
Subcommittee on Health, Employment, Labor, and Pensions, Committee on Education and Labor, U.S. House of Representatives, Washington, DC.
Re: 401(k) Fair Disclosure for Retirement Security Act of 2009

DEAR CHAIRMAN ANDREWS: AARP commends you and the other members of the Subcommittee on Health, Employment, Labor and Pensions for holding this important hearing on the need for comprehensive, informative and timely disclosure of fee and expense information to 401(k) plan participants. Thank you for providing us with this opportunity to submit this statement and the attached reports for the record of this hearing. AARP supports the enactment of the 401(k) Fair Disclosure

for Retirement Security Act of 2009 (401(k) Fair Disclosure Act) and urges the Subcommittee to approve this measure.

With 40 million members, AARP is the largest organization representing the interests of Americans age 50 and older and their families. About half of AARP members are working either full-time or part-time. All workers need access to a retirement plan that builds on Social Security's solid foundation. For those who participate in a 401(k) plan, better and easier to understand information is essential to help them make prudent investment decisions.

There were approximately 50 million active participants in 401(k) plans in 2007, and overall, 401(k) plans held more than $3.0 trillion dollars in assets. These plans have become the dominant employer-based pension vehicle. The participants in these plans have a need and a right to receive timely, accurate, and informative disclosures from their 401(k) plans to help them prepare for a financially secure retirement.

The fee information participants currently receive about their plan and investment options is often scattered among several sources, difficult to access, or nonexistent. Even if fee information is accessible, plan investment and fee information is not always presented in a way that is meaningful to participants.

This must change because fees reduce the level of assets available for retirement. Never has this issue been more important than in these difficult economic times, when retirement savings have been greatly diminished, and every dollar counts.

The Government Accountability Office (GAO) estimated that $20,000 left in a 401(k) account that had a 1 percentage point higher fee for 20 years would result in an over 17 percent reduction—over $10,000—in the account balance. We estimate that over a 30-year period, the account would be about 25 percent less.

Even a difference of only half a percentage point—50 basis points—would reduce the value of the account by 13 percent over 30 years. In short, fees and expenses can have a huge impact on retirement income security levels.

AARP commissioned a report in 2007 to determine the extent to which 401(k) plan participants were aware of fees associated with their accounts and whether they knew how much they actually were paying in fees. The report revealed participants' lack of knowledge about fees as well as their desire for a better understanding of fees. In response to these findings, the report suggested that information about plan fees be distributed regularly and in plain English, including a chart or graph that depicts the effect that the total annual fees and expenses can have on a participant's account balance. I have attached a copy of this report entitled, "401(k) Participants' Awareness and Understanding of Fees", July 2007, for the consideration of the members of the Subcommittee.

AARP commissioned a second study in 2008 to gather information and evaluate a model fee disclosure form developed by the Department of Labor and an alternative disclosure form developed by AARP. I have attached a copy of this report entitled, "Comparison of 401(k) Participants Understanding of Model Fee Disclosure Forms Developed by the Department of Labor and AARP." The report suggested that a disclosure form that contains participant-specific information and actual dollar figures may improve participants' comprehension of the information. The report also suggested other modifications in the DOL form that would make it more helpful to 401(k) plan participants. AARP provided a copy of this report to the Department of Labor as part of our comments on the Department's proposed rule on fee disclosure for participant-directed individual account plans.

AARP's Public Policy Institute also published the attached paper entitled, "Determining Whether 401(k) Plan Fees are Reasonable: Are Disclosure Requirements Adequate?" The paper explains how excessive fees on 401(k) plans can drastically reduce the size of a retirement nest egg and documents the unsatisfactory state of fee disclosure and the lack of knowledge about fees among plan participants. The paper discusses the need for reform of the current regulatory framework to provide participants with the clear and basic information.

AARP supports the enactment of the 401(k) Fair Disclosure Act. The bill would establish a solid framework for providing timely information about fees and expenses to plan participants in a format that is easy for them to understand.

The bill would require plan sponsors to provide a complete picture of investment options to participants—including risk, fees, and historic returns, as well as certain basic information to help investors better understand their investment options and whether those investments will provide long term retirement security on their own or if greater diversification is needed. The comprehensive annual benefit statement required by the 401(k) Fair Disclosure Act would provide a more complete picture of a participant's 401(k) status than available under current law. All of the information that a participant needs would be available in a single disclosure form, rather

than requiring a participant to piece together information from several different documents.

AARP commends you and the Subcommittee for your commitment to preserve and enhance retirement security. We look forward to working with you and the other members of your Subcommittee to enact legislation as soon as possible that would require defined contribution plans to disclose comprehensive, informative and timely information about fees and expenses to plan participants.

If you have any questions or need additional information, please feel free to call me, or please have your staff contact Cristina Martin Firvida of our Government Relations staff at 202-434-6194.

Sincerely,

DAVID P. SLOANE, *Senior Vice President, Government Relations and Advocacy.*

Chairman ANDREWS. And I would ask them to stop sending these monthly reminders to me that I am 50 now, if they would. I will put it in despite the annoying reminders that they are sending me.

Just to reiterate a couple of other pieces of business, Mr. Goldbrum, we invite you to submit your ideas as to how we could solve this problem.

Mr. Chambers and Mr. Bullard, in particular, I think we would like to engage both of you in a discussion about this employer-liability issue, along with the minority, obviously.

Thank you. You really have helped us get this discussion moving along, and identifying answers and questions, which is what we are here to do. We appreciate your contribution, and we appreciate the participation of the members.

The subcommittee will be meeting tomorrow at 10:30 for the issue of how to control health-care costs in the United States. We try to take the small questions each day. We will be meeting tomorrow to do that.

As previously ordered, members will have 14 days to submit additional materials for the hearing record. Any member who wishes to submit follow-up questions in writing to the witnesses should coordinate with majority staff within 14 days. Without objection, the hearing is adjourned.

[Additional submissions of Mr. Miller follow:]

April 24, 2009.

Hon. GEORGE MILLER, *Chairman,*
House Education and Labor Committee, U.S. House of Representatives, Washington, DC.

DEAR CHAIRMAN MILLER: On behalf of the American Society of Pension Professionals & Actuaries (ASPPA), the Council of Independent 401(k) Recordkeepers (CIKR), and the National Association of Independent Retirement Plan Advisors (NAIRPA), we hereby express our support for 401(k) fee disclosure legislation (H.R. 1984) which was recently reintroduced in the 111th Congress.

ASPPA is a national organization of more than 6,500 retirement plan professionals who provide consulting and administrative services for qualified retirement plans covering millions of American workers. ASPPA members are retirement professionals of all disciplines including consultants, administrators, actuaries, accountants, and attorneys. The large and broad-based ASPPA membership gives it unusual insight into current practical problems with the Employee Retirement Income Security Act and qualified retirement plans with a particular focus on the issues faced by small- to medium-sized employers. ASPPA membership is diverse and united by a common dedication to the private retirement plan system.

CIKR is a national organization of 401(k) plan service providers. CIKR members are unique in that they are primarily in the business of providing retirement plan services as compared to financial services companies who primarily are in the business of selling investments. The independent members of CIKR offer plan sponsors and participants a wide variety of investment options from various financial services

companies without an inherent conflict of interest. By focusing their businesses on efficient retirement plan operations and innovative plan sponsor and participant services, CIKR members are a significant and important segment of the retirement plan service provider marketplace. Collectively, the members of CIKR provide services to approximately 68,000 plans covering 2.8 million participants and holding in excess of $120 billion in assets.

NAIRPA is a national organization of firms which provide independent investment advice to retirement plans and participants. NAIRPA's members are registered investment advisors whose fees for investment advisory services do not vary with the investment options selected by the plan or participants. In addition, NAIRPA members commit to disclosing expected fees in advance of an engagement, reporting fees annually thereafter and agreeing to serve as a plan fiduciary with respect to all plans for which it serves as a retirement plan advisor.

ASPPA, CIRK and NAIRPA applaud the bill's uniform application of its disclosure rules to all services providers, regardless of their business structure. Rather than mandating a particular business model, the amended legislation treats all business models equally and fairly.

ASPPA, CIKR and NAIRPA particularly support the bill's requirement that all 401(k) service providers issue a fee disclosure statement to the plan administrator in advance of entering into a contract for services. Specifically, the bill would require that all plan fees be allocated into four uniform categories: (1) plan administrative and recordkeeping charges; (2) transaction-based charges; (3) investment management charges; and (4) other charges as may be specified by the Secretary of Labor. These categories will permit plan fiduciaries to assess the reasonableness of fees by allowing an "apples-to-apples" comparison to other providers, and will allow plan fiduciaries to determine whether or not certain services are needed, leading to potentially even lower fees.

ASPPA, CIKR and NAIRPA commend Chairman Miller for his leadership in enhancing the disclosure of fees to retirement plan fiduciaries and participants, which is critical to securing a dignified retirement for American workers. The Committee's consistent focus on retirement issues over the years has effectively increased attention on the retirement security of our nation's workers.

Again, ASPPA, CIKR and NAIRPA applaud your proposal, enthusiastically support it, and stand ready to assist you in your effort to enact it.

Sincerely,

BRIAN H. GRAFF, ESQ., APM,
ASPPA Executive Director/CEO.

Prepared Statement of the Investment Company Institute (ICI)

The Investment Company Institute[1] appreciates the opportunity to file this statement for the record in connection with the Subcommittee's hearing on April 22, 2009, on the "401(k) Fair Disclosure for Retirement Security Act" (H.R. 1984). The Institute appreciates the willingness of the Subcommittee and the full Committee to listen to our views as it considers H.R. 1984. We agree with the approach taken by the bill to ensure that participants receive key information on all investment products. Disclosure that is focused and useful to participants serves an important role in helping workers be better savers and better investors. However, the Institute believes H.R. 1984 is flawed in several respects, and we cannot support it in its current form. Below we reiterate our support for an effective disclosure regime that provides useful information to employers and plan participants. Then we address our concerns with H.R. 1984.

Improving Disclosure

The Institute has consistently supported meaningful and effective disclosure to 401(k) participants and employers. In 1976—at the very dawn of the ERISA era—the Institute advocated "complete, up-to-date information about plan investment options" for all participants in self-directed plans.[2] We also have consistently supported disclosure by service providers to employers about service and fee arrange-

[1] The Investment Company Institute is the national association of U.S. investment companies, including mutual funds, closed-end funds, exchange-traded funds (ETFs), and unit investment trusts (UITs). ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds, their shareholders, directors, and advisers. Members of ICI manage total assets of $9.71 trillion and serve over 93 million shareholders.

[2] Letter from Matthew P. Fink, Associate Counsel, Investment Company Institute, to Morton Klevan, Acting Counsel, Plan Benefit Security Division, Department of Labor (June 21, 1976).

ments.[3] Disclosure reform should address gaps in the current 401(k) disclosure rules. The Department of Labor's current participant disclosure rules cover only those plans relying on an ERISA safe harbor (section 404(c)); no rule requires that participants in other self-directed plans receive investment-related information. In plans operating under the safe harbor, the information participants receive depends on the investment product, resulting in uneven and difficult to compare disclosure. Disclosure reform also should clarify the information that service providers must disclose to an employer on services and fees to allow the employer to determine the arrangement is reasonable and provides reasonable compensation. Where the service provider's services include access to a menu of investment options, employers should receive from that provider information about the plan's investments, including information about fees.

Initiatives to strengthen the 401(k) disclosure regime should focus on the decisions that plan sponsors and participants must make and the information they need to make those decisions. The purposes behind fee disclosure to plan sponsors and participants differ.

Participants have only two decisions to make: whether to contribute to the plan (and at what level) and how to allocate their account among the investment options the plan sponsor has selected. Disclosure should help participants make those decisions. Participant disclosure should focus on key information about each investment option—including its objectives, risks, fees, and performance—and information about any other plan-level fees assessed against the participant's account. Voluminous and detailed information about the components of plan investment fees could overwhelm the average participant and could result in some employees deciding not to participate in the plan or focusing on fees disproportionately to other important information, such as investment objective, historical performance, and risks.

On the other hand, plan sponsors, as fiduciaries, must consider additional factors in hiring and supervising plan service providers and selecting plan investment options. Information to plan sponsors should be designed to meet their needs effectively.

Plan sponsors should obtain information from service providers on the services that will be delivered, the fees that will be charged, and whether and to what extent the service provider receives compensation from other parties in connection with providing services to the plan. These payments from other parties, commonly called "revenue sharing"—but which are really cost sharing—often are used in a variety of service arrangements to defray the expenses of plan administration. Requiring a service provider to disclose to plan sponsors information about compensation it receives from other parties in connection with providing services to the plan will allow the plan sponsor to understand the total compensation a service provider receives under the arrangement. It also will bring to light any potential conflicts of interest associated with payments from other parties in connection with the plan's services or investments, for example, where a plan consultant receives compensation from a plan recordkeeper.

Concerns with H.R. 1984

H.R. 1984 is intended to close the gaps in current law by setting out the rules for disclosure of service provider compensation and ensuring that participants in all participant-directed defined contribution plans have information on the investments available to them, regardless of type. However, many of the details of the bill need improvement, and in some cases the bill includes unprecedented and unnecessary provisions that are not related to improving disclosure.

It is difficult for affected parties to read the bill and know what information about investment products must be disclosed and who must disclose it. The bill uses imprecise language and undefined terms that service providers will have to interpret broadly in order to avoid the bill's penalties, resulting in disclosure that is confusing to plan fiduciaries and participants and unnecessarily costly to prepare. Lack of certainty on the disclosure requirements also could lead to less standardized disclosure, which makes comparisons more difficult.

Many of our concerns with the bill arise because the bill confuses a 401(k) plan's services with its investments. Plan sponsors and participants need disclosure about both. But without some important clarifications, the bill will force investment disclosure into a service provider box, which will add unnecessary costs that will be borne by participants.

[3] See Statement of Investment Company Institute on Disclosure to Plan Sponsors and Participants Before the ERISA Advisory Council Working Group on Disclosure, September 21, 2004, available at *http://www.ici.org/statements/tmny/04—dol—krentzman—tmny.html.*

A disclosure regime needs to recognize the central role that recordkeepers play in providing investment information on plan investments. When a plan contracts with a recordkeeper to receive administrative services and access to investment products, the plan fiduciary needs to know the services to be provided, the direct and indirect compensation the recordkeeper receives and the fees and other key information about the investment products used by the plan. As is routine best practice now, plan recordkeepers consolidate information on plan investments into a single and useful form, as they have a direct relationship and contract with the plan. Recordkeepers, through their contracts with mutual fund firms, insurance companies, and other investment providers, ensure they have the information they need to provide disclosure on plan investments. Recordkeepers rely on the information provided to them, since for many products it typically comes from disclosure that investment products make under other laws (a point the bill recognizes).

Unfortunately H.R. 1984 does not recognize this central role played by recordkeepers. It defines a contract that requires individualized disclosure 10 days in advance to include "the offering of any investment option." In addition, it defines "service" to include "a service provided directly or indirectly in connection with a financial product in which plan assets are to be invested."

The Institute also is concerned that the bill contains an unprecedented mandate that 401(k) plans offer an index fund of a specific type and requires full service recordkeepers to disclose separate charges for recordkeeping even when there are no separate charges.

Below we detail the Institute's primary concerns with the bill. The bill has other technical and substantive problems about which we will provide comments separately to Committee staff.

A. Index fund mandate

- As a condition of section 404(c) liability relief for the investment decisions of plan participants, the bill imposes a new condition that the plan sponsor select an index fund. (p. 27, line 13). The requirement is inappropriate and sets a dangerous precedent for the government to pick the investment options for private 401(k) plans.
- It is not clear what fund would satisfy the requirement to match the performance of the entire United States equity or bond market and in addition is "likely to meet retirement income needs at adequate levels of contribution" for any participant. This requirement includes both an objective and a subjective standard. An S&P 500 index fund, which is the most common index used in equity index funds, would not appear to meet the objective standard. In addition, it is not clear what fund would meet the subjective standard, because no one index fund is a single investment solution for all retirement savers in all markets. Accordingly, although 70 percent of plans currently offer a domestic equity indexed investment,[4] it appears that very few plans could satisfy this provision now. In addition, the subjective standard exposes plan fiduciaries to significant new liability in selecting index funds for plans.

B. Service provider disclosure

Section 111(a)(1)—General requirements

- The bill apparently would make a mutual fund that offers an investment option to a plan a service provider, because anyone offering an investment is treated as offering a contract for services. (p. 2, line 21-22). The apparent result is that a plan must receive a separate and individualized disclosure from each investment product, rather than (as we expect was intended) the plan receive a single disclosure that lists the fees of all of the plan investments. An investment product like a mutual fund would not have the data necessary to estimate how much of the plan's assets will be invested in that fund. In any event, mutual funds are prohibited by federal law from negotiating with individual shareholders over the fees to be paid for a particular share class of the fund.
- The bill also appears to make a person that provides services to a mutual fund a service provider for purposes of the new disclosure requirements. This is done through the expansive new definitions of "service" and "service provider" under section 111(e)(2) and (4)—which confuse the important distinction between the investments a plan makes with the service providers it engages. (p. 19, lines 13 and 23). These provisions indicate that anyone providing services to an investment option in which a plan invests is treated as providing services that are subject to the new disclosure requirements and is an ERISA plan service provider. For example, mu-

[4] Profit Sharing/401k Council of America, 51st Annual Survey of Profit Sharing and 401(k) Plans (2008).

tual funds have virtually no employees so, along with the fund's investment adviser, funds engage numerous accountants, lawyers, printers, brokers, and others to provide services to the mutual fund. The definition of service and service provider in the bill would indicate that ERISA plan fiduciaries must receive a disclosure concerning all of the services and "charges" paid by a mutual fund to any mutual fund service providers and to fund directors. Relevant information about all the payments a mutual fund makes to its service providers is disclosed in SEC required documents. H.R. 1984 would go beyond that without justification. This provision cannot be reconciled with the provisions in ERISA that exclude service providers to mutual funds from being treated as ERISA plan service providers. See ERISA § 3(21). This provision is unworkable since a mutual fund may have hundreds of service providers, including scores of brokers. Of course, ICI believes that revenue sharing and other payments received by recordkeepers from mutual funds, investment advisers or other entities should be disclosed by the recordkeeper and that plan fiduciaries should receive basic information on the expenses associated with investing in the fund.

Section 111(a)(2)—Unbundling and transaction fees

- Requiring unbundling of recordkeeping charges even when there are no separate charges for the services will result in inaccurate and misleading numbers that favor one business model over another. (p. 3, line 16). Since the estimates required under the bill will not be based on market transactions, service providers face significant liability risk even for reasonable attempts to comply with the requirement.
- There is no definition of "transaction-based charges." (p. 3, line 24). We expect this is intended to cover items like the sales charge (load) on investments, and the costs for accessing individual plan services like plan loans. (A similar provision in the participant disclosure portion of the bill is clearer on this point.) Because of the expansive definition of "service," however, this could be read to require disclosure of internal commissions and transaction costs within a pooled investment product. These are not operating expenses or fees but part of the capital cost of acquiring and selling securities. Mutual funds are required to disclose the fund's portfolio turnover rate, the best measure of the cost of portfolio trading (and which allows comparisons among funds). In addition, funds make available in the Statement of Additional Information a host of information about commissions, including aggregate brokerage commissions paid during the last three years and information about the fund's trading policies.

Section 111(a)(3)—Total dollar amounts

- Requiring disclosure of total dollar amounts when a particular fee is charged on another basis (like percentages or basis points, or as a charge per usage) requires a service provider to make a number of assumptions. (p. 4, line 6). For example, the service provider will need to predict to which investments participants will direct their accounts, and how often participants will use a particular plan feature like loans. The estimate is only as good as the underlying assumptions. This is why a service provider often provides dollar estimates when it believes that it can make reasonably accurate assumptions (long-standing plan which has a consistent history of participant behavior) and may not provide a dollar estimate when it cannot (brand new plan starting with zero plan assets). For example, assume a plan without a loan feature adds one that will require a $20 loan fee for each new loan. How is the service provider to estimate how many loans will be taken out?

Section 111(a)(6)—Financial relationships

- The disclosure of financial relationships is potentially very broad and vague. It is unclear what it means to disclose "the amount representing the value of any services." (p. 5, line 16). It is also unclear whether this requires a service provider to disclose the services and value of the services (even without actual payments) that are made between the service provider and its affiliates. Plan fiduciaries need to know total compensation paid under an arrangement and actual payments. Requiring disclosure of the value of services provided by affiliates does not apprise the fiduciary of any conflicts that are not otherwise apparent and could require disclosure of amounts that are not actually paid between affiliates.
- In fact, we believe that the disclosure of direct and indirect compensation as well as compensation earned by an affiliate in connection with plan services—already required by the bill—will be more effective than requiring a service provider who is not a fiduciary to determine that it may have a material financial relationship triggering disclosure. ERISA's prohibited transaction rules already prohibit transactions between the plan and parties-in-interest and prohibit fiduciaries from self-dealing.
- If this provision is applied within a mutual fund, it will require extensive information of little value. For example, it could require a disclosure that various entities within an integrated fund complex purchase joint insurance and other common prac-

tices involving mutual fund affiliated transactions, all of which occur only in compliance with stringent safeguards under the Investment Company Act of 1940 and SEC regulations.

• The requirement to disclose any personal, business or financial relationship with the plan sponsor, the plan and any plan service provider or affiliate thereof will be nearly impossible to satisfy. (p. 6, line 9). For example, this provision would be triggered if the plan's accounting firm happens to switch its 401(k) recordkeeper to the same recordkeeper that services the employer's plan. It will be impossible for one service provider to monitor constantly whether it is doing business with another plan service provider or its affiliate.

C. Participant disclosure

Section 111(b)(3)

• The bill requires that fees be disclosed to participants in the actual dollar amount rather than on a percentage basis. (p. 15, line 5). Service providers currently do not collect or provide fee information on this basis and it will be extremely expensive to create the systems to report the actual dollar amount of fees associated with each participant account. While it would be possible to provide a fee estimate based on a snapshot of a participant's account (e.g. based on the asset allocation and balances in a participant's account on a particular date), this disclosure will undermine a participant's ability to compare costs of different investment options. For example, if a participant has 90% of his or her account invested in a fund with a 0.40% (40 basis point) expense ratio and 10% invested in a fund with a 1.00% (100 basis point) expense ratio, the participant might think the first fund is relatively expensive and the second is cheaper. Comparability is best measured through use of percentages or basis points or through a representative example (such as the dollar amount of fees for each investment for each $1,000 invested). This is why the SEC, which has looked at this repeatedly over the years, requires mutual funds to disclose the expense ratio up front and a representative example in the front of the prospectus and in shareholder reports.

Section 111(c)—Electronic disclosure

• The bill does not sufficiently promote electronic disclosure. Electronic disclosure should be the presumed method of disclosure to plan fiduciaries and participants and paper copies should be available on request.

Section 111(d)—Application to insurance and bank products

• The bill needs to be modified to ensure that there is a sufficient level of fee disclosure for traditional fixed interest insurance and bank products. The bill simply requires that the Secretary of Labor issue rules to identify products that provide a guaranteed rate of return. The bill should direct the Secretary to require disclosure that alerts participants to the risks and economics of these products, for example that the cost of the fixed return product is built into the stated rate of return because the insurance company or bank covers its expenses and profit margin by any returns it generates on the participant's investment in excess of the stated rate of return.

D. Effective date

• Allowing only one year for service providers and plan administrators to come into compliance with the provisions is unrealistic. DOL will not have issued final rules implementing the statutory provisions with enough time for service providers to adjust during that period.

The mutual fund industry is committed to meaningful 401(k) disclosure, which is critical to providing secure retirements for the millions of Americans that use defined contribution plans. We thank the Committee for the opportunity to submit this statement and look forward to continued dialogue with the Committee and its staff.

[Questions for the record requested from Mr. McKeon follow:]

[VIA FACSIMILE],
U.S. CONGRESS,
Washington, DC, May 6, 2009.

Mr. JULIAN ORONATO, *CEO,*
ExpertPlan, Inc., Building 400, Suite 300, East Windsor, NJ

DEAR MR. ORONATO: Thank you for testifying at the Wednesday, April 22, 2009, Subcommittee on Health, Education, Labor, and Pensions hearing on "H.R.1984, the 401(k) Fair Disclosure for Retirement Security Act of 2009."

The Senior Republican Member on the Committee, Congressman Howard P. "Buck" McKeon had additional questions for which he would like written responses from you for the hearing record.

Senior Republican Member McKeon asks the following questions:

During your oral testimony before the Committee, you stated that your firm provides startup 401(k) plans for an annual charge of $600, plus $36 per participant annually, and that these firms typically had 15 employees. To assist the Committee in our research on fee disclosure, please answer the following questions and provide a copy of a standard contract and a fee schedule or other fee disclosure material. Unless otherwise indicated, the questions below are with reference to the hypothetical startup plan and costs noted above.

1. Do you have a different fee schedule when dealing with a third party administrator (TPA) and a single employer? If so, why, and what are the differences in these schedules?

2. Does the above-quoted cost include all the services required to administer a plan and meet regulatory compliance requirements? If not, which additional services would a plan sponsor need to secure? What cost do you charge for these additional services?

3. Does your firm charge any one-time (or recurring) set-up or conversion fee to plan sponsors?

4. Are plans offered at the above-referenced charge restricted in the investments that its sponsor may select? If yes, what are the criteria for any such restriction?

5. Which funds are on your platform? Is revenue sharing a criterion for the platform? Do you assess an additional charge for non-platform investments?

6. Do you receive any other sources of revenue, such as 12b-1 or sub-transfer agency fees? If so, are these revenues disclosed to the plan sponsor?

7. Does the above-referenced fee include nondiscrimination testing for all types of plans?

8. Does your firm assess additional fees for restating prototype plans? If so, how much?

9. Does your fee include a quarterly benefit statement?

10. Does the above-referenced fee include the processing of loans, distributions, and rollovers? If it does not, what fees are associated with these services?

Please send your written response to the Committee on Education and Labor staff by COB on Wednesday, May 20, 2009—the date on which the hearing record will close. If you have any questions, please contact the Committee. Once again, we greatly appreciate your testimony at this hearing.

Sincerely,

ROBERT E. ANDREWS, *Chairman,*
Subcommittee on Health, Education, Labor, and Pensions.

[Whereupon, at 12:11 p.m., the subcommittee was adjourned.]