COMMENTS ON PROPOSED RULE ON FIDUCIARY REQUIREMENTS FOR DISCLOSURE IN PARTICIPANT-DIRECTED INDIVIDUAL ACCOUNT PLANS

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United States Department of Labor
Washington, DC
delivered electronically to e-ori@dol.gov

RE: Participant Fee Disclosure Project

On behalf of the Profit Sharing / 401k Council of America (PSCA), I am pleased to provide comments on the Proposed Rule on Fiduciary Requirements for Disclosure in Participant-Directed Individual Account Plans. Established in 1947, PSCA is a national, non-profit association of 1,200 companies and their 6 million plan participants. PSCA represents its members' interests to federal policymakers and offers practical, cost-effective assistance with profit sharing and 401(k) plan design, administration, investment, compliance and communication. PSCA's services are tailored to meet the needs of both large and small companies. Members range in size from Fortune 100 firms to small, entrepreneurial businesses.

We commend the Department for the proposed rule. It reflects many of the principles raised by PSCA and many other organizations that represent the sponsor and provider community in our July 24, 2007, response to the Department's Request for Information on participant fee disclosure. For example, the proposed rule is limited to participant-directed individual account plans; recognizes that participant and plan sponsors require different levels of disclosure; limits disclosure to fees paid by participants; requires that disclosure is made in context of other factors related to an investment decision; considers the cost of providing disclosure; and encourages electronic disclosures.

Disclosure to participants and beneficiaries
The proposed rule requires that plan-related and investment-related information be provided on or before the date of plan eligibility, and at least annually thereafter, to each participant or beneficiary that has the right to direct investments in their account. Pursuant to section 3(7), "participant" includes an employee who may become eligible to receive a benefit under the plan.

We recommend that the final rule require initial disclosures to participants under paragraphs (c) and (d) on or before the date of participation in the plan, not the date of plan eligibility. Requiring initial disclosure on or before participation in the

plan, prior to the actual selection of a designated investment alternative, provides many advantages. It will result in incorporating the disclosures required under the proposed rule into the plan enrollment process, when the employee's attention is focused on the plan features and the investment selection process. The enrollment process is often automated, and the disclosures can be efficiently incorporated, thereby keeping cost, usually paid by participants, as low as possible. Another benefit to this approach is that the cost of providing disclosures to employees who choose not to participate in the plan is avoided.

An argument in support of providing disclosure on or before eligibility is that providing information at this time will increase participation. In fact, many employers actively advertise their retirement benefit plan to employees on or before their eligibility date. We do not believe that delaying a regulated disclosure of prescribed information will inhibit this practice or that employees will be harmed by a delay in the required disclosures until the employee takes actions to enroll in the plan.

If the Department concludes that disclosures must be provided prior to or on the date of eligibility, we urge that special relief, requiring only that disclosure be made prior to participation, be afforded for plans that provide immediate eligibility. Without this relief, disclosure would have to be provided on or before the first day of employment. Electronic disclosure to an individual before they are employed is problematic at best, and a rigid rule requiring disclosure on the first day of employment will result in unnecessary cost and compliance exposure.

The final rule should require annual disclosure only to participants enrolled in the plan. This will avoid the cost of disclosure to employees who choose not to participate in the plan. As noted above, plan sponsors will continue to market the plan to non-participants without this regulatory requirement.

Section 3(8) defines a beneficiary as a person designated by a participant or the terms of the plan that is *or may become* entitled to a benefit thereunder. **We believe the disclosures required under the proposed rule apply only to beneficiaries with the current right to direct investments in their account and we request that the final rule clarify this interpretation.** A requirement to provide disclosure to all beneficiaries would be extremely complex and costly.

Beneficiaries gain the right to direct investments when a participant dies or as the result of a qualified domestic relations order, both events which are beyond the control of the plan sponsor. It is impossible to provide the disclosures required under the proposed rule to beneficiaries on or before the date that a beneficiary gains this right. Additionally, electronic communication with beneficiaries is usually not feasible, even if the current rules on electronic communication are relaxed, because the beneficiary in most cases will not have any connection with the plan sponsor. **We recommend that the final rule require disclosure to beneficiaries not later than 90 days following the occurrence of**

an event that results in the beneficiary obtaining the right to direct investments in their account, and annually thereafter.

Administrative expenses
Paragraph (c)(2)(i) of the proposed rule requires an initial and annual explanation of administrative expenses, *to the extent not otherwise included in investment related fees*. Paragraph (c)(2)(ii) requires that the dollar amount of administrative expenses actually charged to an individual account during the preceding quarter be reported at least quarterly. Paragraph (2)(ii) does not include the phrase "to the extent not otherwise included in investment-related fees." Based on informal discussions with the Department, we understand that the phrase is intended to also apply to paragraph (2)(ii). **We recommend that the final rule amend paragraph (c)(2)(ii) to include the phrase "to the extent not otherwise included in investment-related fees."**

We are pleased that the proposed rule permits administrative expenses to be reported in general categories, rather than on a service-by-service basis. This approach provides adequate information in a cost-effective manner. **We urge that the final rule retain this treatment of expenses.**

Material changes
The proposed rule requires that a notice describing any material change be provided not later than 30 days after the date of adoption of such change. **We recommend that the final rule require that such notice be provided not earlier than 90 days and not later than 30 days prior to the effective date of the change.** This approach will ensure that advance notice is provided. Providing a notice 30 days after adoption of the change will result in implementing a change without advance notice if the change is effective less than 30 days after adoption. At the other end of the spectrum, a change could be adopted far in advance of an effective date. Under this scenario, the proposed rule could result in notice being delivered far in advance of the effective date, with the likelihood that it will be forgotten by the time the change is implemented. **The rule should provide relief from the 30-day limit similar to that afforded under section 101(i)(2)(C), relating to an exception to the 30-day notice requirement for blackout notices.**

Individual expenses
The final rule should specify that, for purposes of paragraph (c)(3), when determining which fees must be disclosed, a fiduciary may rely on 2520.102-3(l), relating to the contents of a summary plan description. Specifically, subsection (l) requires "Plans also shall include a summary of any provision that may result in the imposition of a fee or charge on a participant or beneficiary, or on the individual account thereof, the payment of which is a condition to the receipt of benefits under the plan."

Investment-related information
The proposed rule requires the disclosure of an Internet Web site that contains supplemental information regarding plan investments. We applaud the Department for

this approach. The term "Internet Web site" has created many questions from our members. **We recommend that the final rule clarify that a plan sponsor's intranet system or any other web-based location accessible by participants and beneficiaries may be used to satisfy the requirements of paragraph (d)(1)(i)(B). The final rule should also explicitly provide that the requirements of paragraph (d)(1)(i)(B) may be met by providing the supplemental information in a written document rather than a website, because may companies do not have access to a website. .**

Certain types of investments that may be intended to be included in products "with a fixed rate of return" in reality have a variable rate of interest. A stable value fund is such a product. Stable value fund rates of return vary from month to month based upon the earnings in the fund. Most stable value funds have an investment related charge. **The final rule should allow this type of fund to report the investment related charges and otherwise be treated as an investment with a fixed rate of return under paragraphs (d)(1)(d)(ii), (iii), and (iv).**

The Model Comparative Chart and the relief it affords under paragraph (e)(3), is a welcome addition to the proposed rule. **We recommend that the final rule specify that the inclusion of other disclosures required under the proposed rule, or any other information, in the Model Comparative Chart will not result in the failure of the model chart being deemed to meet the requirements of paragraph (d)(2). We also recommend that the final rule specify that a variation in the format of the chart, such as the order of the columns containing required information, will not result in the loss of the relief provided in paragraph (e)(3).**

Issues for investments that are not subject to the Investment Company Act of 1940. The proposed rule incorporates the definitions of average annual total return and total annual operating expenses found in guidance issue by the Securities and Exchange Commission for investments subject to the Investment Company Act of 1940 (the 40 Act). It also requires production of a 40 Act prospectus "or similar document." While this methodology has existed in the section 404(c) regulations for several years, it is critical that the final rule reflect several concerns relating to investments not subject to the 40 Act.

While mutual funds are the dominant type of investment in plans subject to the proposed rule, other types of investments offer significant advantages for some plans. For example, large plans frequently employ collective trusts, employer securities, and separate managed accounts as designated investment alternatives, partly because these investments can be provided at significantly lower costs to participants than other alternatives. These investments do not have the same disclosures or use the same calculations as is used by the mutual fund industry, upon which this proposal is based. **The Department should be sensitive to any adverse consequences, including increased costs to participants, as the result of conforming to a mutual fund format.**

Employer securities need separate treatment under the final rule. Many required investment-related disclosures simply do not apply to employer securities, including principal strategies and attendant risks, the assets comprising the investment portfolio, turnover, the type or category of the investment, and whether it is actively or passively managed. The final rule should clarify that, for any designated investment alternative, only disclosures that reflect attributes of a particular investment must be disclosed. Total annual operating expense, in the case of brokerage expenses in a non-unitized employer stock fund which are charged only to the stock bought or sold in a particular transaction, would be very difficult and time-consuming to track. The final rule should provide relief for such disclosure.

The benchmarking requirement in paragraph (d)(1)(iii) presents challenges for certain investments. In all cases, maximum flexibility should be afforded. Publicly traded employer securities are often benchmarked in industry sectors or against broad indexes such as the Dow Jones Average or the S&P 500. These currently available benchmarks should satisfy the final rule. **Privately held employer securities may not have access to any benchmark and should therefore be exempt from this requirement. Collective trusts and separate managed accounts usually are designed to mimic fund categories such as large-cap growth, international, balanced, etc. They should be permitted to benchmark against these categories.**

Reporting in dollar amounts

Paragraph (e)(4) provides that disclosures are not required in dollar amounts except for the reporting of quarterly administrative expenses and quarterly individual costs. **PSCA has consistently commented throughout the Department's fee disclosure activities that participant fees should be described in dollar terms in order to increase understanding of the impact of fees. We believe that dollar costs expressed on hypothetical amounts, such as required in a mutual fund prospectus, are adequate. We recommend that this approach be required for all disclosures in the proposed rule.**

Good Faith Reliance on Information Received from a Service Provider. Footnote 7 in the Preamble states "fiduciaries shall not be liable for their reasonable and good faith reliance on information furnished by their service providers with respect to disclosures required by paragraph (d)(1) [investment-related information to be provided automatically]." **We recommend that this important relief be incorporated into the body of the final regulation.**

Effective date

While many plans already provide some or all of the disclosures required under the proposed rule, few, if any, plans meet the specific timing and content requirements. Final systems changes needed to comply with the final rule cannot be developed until the final rule is published**. PSCA recommends that the effective date of the final rule be the**

plan year beginning after twelve months after the publication of the final rule or the first plan year beginning after December 31, 2009, whichever is later.

Thank you for considering our comments. Please feel free to contact me at 312-419-1863 or Ed Ferrigno at 202 863 7272 if you have any questions or if we can be of any assistance.

Sincerely,

David L. Wray
President