ASSOCIATION FOR ADVANCED LIFE UNDERWRITING

September 8, 2008

VIA E-MAIL
e-ORI@dol.gov

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

Dear Sir or Madam:

This letter sets forth comments of the Association for Advanced Life Underwriting ("AALU") with respect to the Department of Labor ("DOL") proposed regulations under sections 404(a) and 404(c) of the Employee Retirement Income Security Act of 1974 ("ERISA") published in the Federal Register on July 23, 2008 (the "Proposed Regulations").

AALU is a nationwide organization of life insurance agents, many of whom are engaged in complex areas of life insurance such as business continuation planning, estate planning, charitable planning, retirement planning, deferred compensation and employee benefit planning. AALU represents approximately 2,000 life insurance agents and financial advisors nationwide.

Our comments address the application of the Proposed Regulations to plans with fewer than 100 active participants. Because of the unique hardships that would be imposed on small plans and their sponsors if the Proposed Regulations were finalized in their current form, we recommend that the small plans be exempted from these Regulations. Alternatively, if small plans are not exempted from the application of these Regulations, we request a delayed effective date for small plans.

Since the enactment of the Pension Protection Act of 2006 ("PPA"), retirement plans have been subject to increased rules relating to disclosure. Small employers find that maintaining plans for their employees is becoming more complex and expensive. Subjecting small employers to the disclosure requirements set forth in the Proposed Regulations creates additional hardships and costs for small plan sponsors with limited benefit to the participants. The burdens of these rules will not only make it difficult for small plan sponsors to satisfy their fiduciary duties, but will also discourage small employers from maintaining defined contribution plans for their employees.

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The additional costs in conjunction with an increase in the risk of liability may be perceived by some employers as not worth the benefit of a retirement plan.

Assumptions in the Proposed Regulations Relating to Costs

In the preamble to the Proposed Regulations, the DOL asserts that the total overhead cost for a one-participant plan in the initial year of compliance is $131. Included in these costs is $69 in review costs, equaling one-half hour of a legal professional's time plus one-half hour of a clerical professional's time. In another area of the preamble, the DOL estimates that the annual disclosure is estimated to be 13 pages. Furthermore, the Proposed Regulations require that certain expenses be disclosed on a quarterly basis. It is unclear to AALU how the DOL determined that legal costs for reviewing 13 pages of disclosure on an annual basis and the quarterly disclosures are limited to less than $57 in the initial year and $28 in subsequent years.

AALU questions the accuracy of the DOL's estimate on two fronts. First, it is unreasonable to think that the time required for an attorney or other legal professional to review the rules and draft the required annual notice approximating 13 pages would be thirty minutes. A more realistic estimate of the time that must be spent by an attorney to ensure the disclosures satisfy all legal requirements would be 5-10 hours per year, if not more. Second, AALU does not believe that the hourly rate used by the DOL to determine the legal fees estimate reflects the realities of a sponsor of a small plan. More likely than not, a small employer will not have an in-house attorney or legal professional adept at ensuring the sponsor's compliance with ERISA. Rather, a small employer will have to engage outside counsel to assist with the legal review. According to a survey conducted by National Law Journal and reported on December 10, 2007, the average billing rate for attorneys at firms responding to the survey was $348 per hour, a rate which is three times the hourly rate relied upon by the DOL in the Proposed Regulations. The reality for a small plan is that outside attorneys will have to be engaged to assist the plan sponsor in complying with the disclosure regulations and that such costs will be passed on to plan participants, who, because of the size of the population, will bear a burden greater than that of larger plans.

Costs to Small Plans Relating to the Gathering of Information for Disclosure Notices

In addition to the legal costs, sponsors of small plans must also determine how all of the information to be disclosed should be gathered. In many instances, third-party administrators will be in the forefront in trying to compile the necessary information. However, because the plan sponsor is a fiduciary of the plan, the plan sponsor will be responsible for any failures to satisfy the disclosure requirements. Due to the limited bargaining power of the small plan sponsor, it is unlikely that the third-party administrator gathering materials to satisfy these regulations will be a fiduciary who can be held responsible for the failure to comply with the fee disclosure rules. Additionally, because its ability to customize service provider contracts is limited, a small plan sponsor will probably not have a cross-over claim against the third-party administrator for failing to comply with the disclosure rules. Consequently, in order to ensure full compliance and limit liability, the small plan sponsor will be required to verify all information placed on the disclosures. Small employers, by virtue of their size and nature, do not generally have the capacity or resources to ensure the completeness and accuracy of the information included in the disclosures. It is not clear whether a small plan sponsor will be able to ensure that it is fully complying with the regulations.

Assumptions in Proposed Regulations Relating to Reduced Fees

The DOL claims that one benefit of the Proposed Regulations, if final, would be reduced plan fees. First, the additional costs associated with the administrative burden of the Proposed Regulations will be borne by the participants. As stated above, the DOL's estimates of the costs appear unreasonably low, as the assumptions on which they are based are unrealistic. Rather, there will be considerable additional costs to comply with the fee disclosure rules, most or all of which will be borne by a small population. Second, the mere fact that participants are aware of fees does not necessarily mean that participants will switch out of the higher-priced investments. Several other factors should be considered by participants. The GAO noted in its 2007 report regarding fees that higher fees might result when an investment option has additional features.[1] More relevant to the participant is the net return of his or her investments. Certain investments may cost more, but their overall return may be higher than lower-cost alternatives. Thus, it does not necessarily hold true that more disclosure will result in participants transferring their moneys to investments with lower fees. Third, even if the disclosure of some fees would cause certain participants to transfer into lower-cost investments, the DOL notes only 29% of participants will benefit from the disclosures. If the Proposed Rules are finalized to apply to small plans, a majority of participants (71%) in plans with small populations will bear a considerable increase in fees (due to administrative costs) in order that 29% of participants might have the opportunity to transfer their accounts to lower-cost investment funds. Because of the increased administrative costs which must be spread over a small population, any reductions in fees experienced by small plans will be diminished.

Sensitivity of Small Plans to Increased Costs

A report prepared for the Office of Advocacy in the Small Business Administration in 2005 noted that the administrative costs for a small plan ranged from $59 to $439 per participant whereas the annual cost per participant in larger plans ranged from $31 to $57 per participant.[2] This report was based upon an examination of amounts reported on 1998 Forms 5500. The report notes that there are a minimum amount of administrative costs for every plan and that small plans have a smaller population over which to spread these costs. Since 1998, the requirements for maintaining plans have become more onerous and we can reasonably conclude that the cost per participant has increased substantially for small plans. Implementing these rules for small plans will only add to the small plan's burden.

In its report released on July 18, 2008, the GAO noted that sponsors of small plans have "very little fiduciary knowledge."[3] Consequently, they must rely upon outside providers to guide them in fulfilling their fiduciary duties. As the GAO noted in its report, "[a]ccording to Labor's guidance, a plan fiduciary should hire and monitor external experts if the sponsor lacks the expertise internally."[4]

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[1] United States Government Accountability Office, Private Pensions: Changes Needed to Provide 401(k) Plan Participants and the Department of Labor Better Information on Fees 19 (November 2006).
[2] Joel Popkin and Company, Small Business Association Office of Advocacy, Cost of Employee Benefits in Small and Large Businesses 36 (August 2005).
[3] United States Government Accountability Office, Private Pensions: Fulfilling Fiduciary Obligations Can Present Challenges for 401(k) Sponsors 23 (July 2008).
[4] Id. at 19.

These additional disclosure rules will necessitate the hiring of outside experts by sponsors of small plans, thereby considerably increasing the costs and burdens of administering such plans.

Additional Rules Discouraging the Establishment and Maintenance of Small Plans

In its report, the ERISA Working Group noted that "a balance must be struck between what can reasonably be expected of small plan sponsors and the potential capabilities of larger plan sponsors."[5] No rule should be adopted that is so burdensome that it discourages the adoption and maintenance of retirement plans. In this case, small plans will be subject to significant additional costs with dubious benefits to participants. The fact that these requirements are complex, onerous and costly discourages small employers from establishing and maintaining retirement plans for their employees. Creating significant additional costs with uncertain benefits will further discourage the establishment of small plans. Certainly this result is not in the best interest of the participants.

Delay in Effective Date for Small Plan

In the event that small plans are not exempt from the disclosure regulations, we implore the DOL to delay the effective date for small plans. Larger plans have a better ability to absorb the costs for initially developing the systems necessary to create disclosures complying with the Proposed Regulations. Additionally, as recommended by the ERISA Working Group in its report, "[d]elaying the application would likely allow service providers time to design necessary systems to provide the contemplated disclosures in a cost effective manner for such [small plan] sponsors."[6] As sponsors of small plans are more sensitive to additional costs, we request that the additional costs for small plans be minimized by delaying the effective date to a date at least one year following the effective date for large plans.

AALU is appreciative of the opportunity to submit these comments.

Sincerely,

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Assn. for Advanced Life Underwriting

David J. Stertzer, FLMI
CEO
Assn. for Advanced Life Underwriting

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[5] Advisory Council on Employee Welfare and report of the Working Group on Fee and Related Disclosures to Participants 5 (November 10, 2004).
[6] Advisory Council on Employee Welfare and report of the Working Group on Fee and Related Disclosures to Participants 8 (November 10, 2004).