TESTIMONY OF DAVID L. WRAY
PRESIDENT, PROFIT SHARING/401k COUNCIL OF AMERICA
BEFORE THE
U.S. DEPARTMENT OF LABOR
IN THE HEARING ON THE PROPOSED 408(b)(2) REGULATIONS

Established in 1947, the Profit Sharing/401k Council of America (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.

Qualified retirement plan fiduciaries are expected to arrange for services paid for with plan assets only when the fees charged for those services are reasonable. However, a determination of the fees paid from a plan and how those fees are determined can be difficult. The operation of today's defined contribution program requires a multiplicity of services. In addition to investment management, these plans require recordkeeping, administration, compliance, communications to plan participants, consultants and advisers, specialists like firms that handle only QDRO filings and trustee services.

Plan sponsors and participants expect that the services provided to their plans are of the highest quality and constantly improving. Those who provide services to defined contribution retirement plans have responded with efficient, innovative and high quality solutions, often using complex business models with complicated fees and fee sharing arrangements. Most plan fiduciaries do not have an expert understanding of the business models of those who provide plan services. They must rely on the fee-related disclosures provided by their service providers. Often service providers provide the information that plan sponsors need in a form that helps them meet their fiduciary obligation. Sometimes they do not.

In the proposed regulation the Department of Labor has made it clear that it expects retirement plan fiduciaries to know with specificity all of those who receive compensation or fees as the result of the provision of certain plan services, and how their fees are determined, in order to ensure that fees paid from plan assets are reasonable. While PSCA applauds the Department's intent to require fee disclosure by providers to fiduciaries, we have concerns about the proposed regulation. First, the proposed regulation is not clear about the extent of the information required to be disclosed. The proposed regulation could be interpreted as requiring detailed lists of every entity and individual providing any type of services to an organization providing a covered service to a plan. The Department then makes it clear that the required disclosures must be considered when determining the reasonableness of plan fees. The Department must recognize that a plan fiduciary is most often a small or medium size business owner with no particular expertise in ERISA law or the service provider industry. The proposed regulation should be revised to reflect this reality--otherwise, some business owners will likely reconsider their decision to offer a benefit plan to their workers.

Second, PSCA recommends that the requirement that a service provider disclose conflicts of interest be removed, but the requirement to disclose material relationships be retained. The conflict of interest concept is new and undefined. It apparently is not a condition that is prohibited under section 406. The inclusion of this concept in these regulations will confuse both fiduciaries and providers, adding cost and uncertainty to the administration of employer-sponsored retirement plans. Additionally, a common sense definition of a material relationship is needed.

Third, PSCA is concerned that the current state of the law does not permit the Department to require compliance with the regulations by many of those being paid from plan assets, including some investment managers who receive the major portion of most plan's fees. Unfortunately, much of the discussion about the proposed regulations is not about the disclosure of information to help plan fiduciaries ensure that plan fees are reasonable. Rather, it is about who the Department can compel to comply. It is incumbent on the Department to clarify persuasively that it has the authority to require that everyone paid from plan assets comply with the disclosure requirements.

PSCA is concerned that the proposed regulations may have greatly expanded what plan fiduciaries must consider in order to ensure that fees are reasonable. At the same time it is uncertain that the Department can compel service providers to provide the needed information. It is possible that with these regulations the Department will have imposed increased accountability on plan fiduciaries without giving them what they need to act appropriately; thereby expanding their liability and exposure to frivolous lawsuits. This is a perilous outcome for plan sponsors that could result in reduced benefits for American workers.

PSCA believes that the following principles should be considered as the Department revises the proposed regulations:

Plan Sponsors Need Specific Information. Plan sponsors need the following information to assess the reasonableness of plan fees: What are the fees and who is receiving them? How are the fees paid? What services are provided? Who is providing the services? What are the relationships amongst service providers to the plan?

Disclosures to Plan Sponsors Must be Meaningful and Comprehensive. The final rule should be devoted to providing plan sponsors with accurate, meaningful, and useful information to assist them in fulfilling their fiduciary responsibility to ensure that any use of plan assets to defray the expense of administering a plan is reasonable. It is imperative that the final rule provides full disclosure of all investment-related plan fees to the degree that a responsible plan fiduciary has a duty under ERISA to ensure that such fees are reasonable.

Disclosures Should Address the Needs of All Plan Sponsors. The final rule must address the needs of the least sophisticated plan sponsors while not overburdening either them or the most sophisticated plan sponsors.

Information Should be Aggregated by the Service Provider. The final rule should mandate that the service provider should be required to collect any required disclosures and present them in a single document.

Disclosures Should Depend upon Material Relationships and not "Conflicts of Interest." The term "conflict of interest" connotes a level of impropriety by the service provider. Instead, we believe a better approach is to require disclosure of material relationships.

Detailed Participant Disclosure May be Provided Upon Request. We support sharing any information provided to plan sponsors under any new fee disclosure rules with participants, but only upon the request of a participant. (In addition to any new broad-based participant disclosure requirements)