ROBINSON BRADSHAW & HINSON

CARL E. JOHNSON, JR.
CHARLOTTE OFFICE

DIRECT DIAL: 704.377.8327
DIRECT FAX: 704.373.3927
CJOHNSON@RBH.COM

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<u>VIA E-MAIL</u> (e-ori@dol.gov)

Office of Regulations and Interpretations
Employee Benefits Security Administration, Room N-5669
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, DC 20210

ATTENTION: 401(K) PLAN INVESTMENT ADVICE RFI

Re: PTE – Investment Advice to Participants in Individual Account Plans

Ladies and Gentlemen:

I am compelled to write to you after reading one of the comments made by the ASPPA (letter dated February 21, 2007) to you in response to your request for information on this difficult subject.

In response to your request for information regarding challenges that might be encountered in assembling and/or presenting the information on fees and compensation in a manner that is clear and understandable by the average plan participant, the ASPPA said the following:

> The biggest challenge may be explaining to participants that any indirect compensation received by the adviser does not affect or increase the amount paid by the participant. Participants need to understand the amount that they pay, directly or indirectly, but also that compensation received by plan advisers does not increase that amount. For example, if an ASPPA adviser receives a share of 12b-1 fees paid by a mutual fund, it does not increase the amount paid by the participant.

<u>In fact, what the participants need to know is that payment of the advisor fees indirectly through 12b-1 fees may well increase the amount paid by the participant.</u>

Within the past year or two our firm was approached by a large financial advisor with a pitch for our own 401(k) plan business. With respect to fees, the advisor's representative said, "Don't worry about our fees. We'll be recommending funds with 12b-1 fees so the participants will be paying our fees, not you [the employer]."

Incidentally, this particular advisor also offers to partner with the employer as a plan investment fiduciary.

Obviously, indirect fee payment arrangements can increase the amount paid by participants. Fund A with operating expenses of 75 basis points and a 25 basis points 12b-1 fee costs the participant more than comparable Fund B with operating expenses of 75 basis points and no 12b-1 (or similar) fees.

Of course, it's not quite as simple as that. Possibly, but in most cases unlikely, there is no fund comparable to Fund A, but without 12b-1 fees.

Moreover, the investment advisor must be paid in one manner or the other. If, in my example, the <u>only</u> alternative is for the investment advisor to be paid <u>directly by the plan</u> 25 basis points on every dollar invested in Fund B, then the arithmetic does reach the same result.

However, that's not necessarily the only possibility. The employer might pay the advisor's cost directly and not charge those costs against the plan, at substantial savings to the participants. Even assuming that the employer may recover its cost indirectly through a reduction in its contributions to the plan, the cost allocation among participants will be different (that is, it will be contribution- or compensation-based rather than asset based). Whether this is a good or bad result is separate question I'm not going to address here.

Further, if the employer pays the cost directly, the employer may be more likely to focus on the amount of the advisor's fees and as a result negotiate a better fee deal.

Significantly, the ASPPA's comments also included the following good advice:

> Information regarding any adviser compensation that is based on (or calculated by reference to) the particular investments made by the participant would be helpful. Such information would give the participants and beneficiaries a <u>basis to determine the extent to which the adviser could have a conflict of interest in providing its advice</u>. Participants should also be informed how the fees are calculated; that is, whether the fees are based on a percentage of assets, a flat fee or an hourly fee. (Emphasis added.)

Among the <u>possible</u> results of such a conflict of interest when the investment advisor's fees are paid indirectly is increased compensation to the advisor and increased cost to the participants.

Very truly yours,

Carl E. Johnson, Jr.