**WRITTEN TESTIMONY OF BRADFORD P. CAMPBELL**
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**BEFORE THE**
**COMMITTEE ON HEALTH, EDUCATION, LABOR, AND PENSIONS**
**U.S. SENATE**

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**Introductory Remarks**

Good morning Chairman Harkin, Ranking Member Enzi, and Members of the Committee. Thank you for inviting me to discuss plan fees, the Department of Labor's role in overseeing plan fees, and proposals to increase transparency and disclosure of plan fee and expense information. I am Bradford Campbell, the Assistant Secretary of Labor for the Employee Benefits Security Administration (EBSA). I am proud to be here today representing the Department of Labor and EBSA. Our mission is to protect the security of retirement, health and other employee benefits for America's workers, retirees and their families, and to support the growth of our private benefits system.

Ensuring the security of retirement benefits is a core mission of EBSA, and one of this Administration's highest priorities. Excessive fees can undermine retirement security by reducing the accumulation of assets. It is therefore critical that plan participants, directing the investment of their contributions, and plan fiduciaries, charged with the responsibility of prudently selecting service providers and paying only reasonable fees and expenses, have the information they need to make appropriate decisions.

That is why the Department began a series of regulatory initiatives to expand disclosure requirements in three distinct areas:

1. Disclosures by plans to participants to assist in making investment decisions;

2. Disclosures by service providers to plan fiduciaries to assist in assessing the reasonableness of provider compensation and potential conflicts of interest; and

3. More efficient, expanded fee and compensation disclosures to the government and the public through a substantially revised, electronically filed Form 5500 Annual Report.

Each of these projects addresses different disclosure needs, and our regulations are tailored to ensure that appropriate disclosures are made in a cost effective manner. For example, participants are unlikely to find useful extensive disclosure documents written in "legalese"—instead, it appears from comments we received thus far that participants want concise and readily understandable comparative information about plan costs and their investment options. By contrast, plan fiduciaries want detailed disclosures in order to properly carry out their duties under the law, enabling them to understand the nature of the services being provided, all fees and expenses received for the services, any conflicts of interest on the part of the service provider, and any indirect compensation providers may receive in connection with the plan's business.

We have made significant progress on these projects. On November 16, 2007, we issued a final regulation requiring additional public disclosure of fee and expense information on the Form 5500. On December 13, 2007, we published a proposed regulation requiring specific and comprehensive disclosures to plan fiduciaries by service providers, and held two days of administrative hearings on the proposed regulation on March 31 and April 1, 2008, and we plan to complete a final regulation this year. On July 23, 2008, we published a proposed rule requiring plans to disclose fee and expense, investment return and other essential information to plan participants. This proposal was informed by public comments on participant disclosures we received following a Request for Information published on April 25, 2007. The public comment period on the proposed regulation recently closed, and we are evaluating the comments received from consumer groups, plan sponsors, service providers and others as we work to finalize the proposal.

The Employee Retirement Income Security Act of 1974 (ERISA) provides the Secretary of Labor with broad regulatory authority, enabling the Department to pursue these comprehensive disclosure initiatives without need for a statutory amendment. The regulatory process currently underway ensures that all voices and points of view will be heard and provides an effective means of resolving the many complex and technical issues presented. I hope that as Congress considers this issue, it recognizes the Department's existing statutory authority and takes no action that could disrupt our current efforts to provide these important disclosures to workers. My testimony today will discuss in more detail the Department's activities related to plan fees. Also, I will describe the Department's regulatory and enforcement initiatives focused on improving the transparency of fee and expense information for both plan fiduciaries and participants.

**Background**

EBSA is responsible for administering and enforcing the fiduciary, reporting, and disclosure provisions of Title I of ERISA. EBSA oversees approximately 679,000 private pension plans, including 387,000 participant-directed individual account plans such as 401(k) plans, and millions of private health and welfare plans that are subject to ERISA.[1] Participant-directed individual account plans under our jurisdiction hold over $2.2 trillion in assets and cover more than 65 million participants. Since 401(k)-type plans began to proliferate in the early 1980s, the number of employees investing through these types of plans has grown dramatically. Assets held in these plans are, in real terms, more than 13 times greater than the amount held in 1984 and have increased by 22.5 percent since 2000. EBSA employs a comprehensive, integrated approach encompassing programs for enforcement, compliance assistance, interpretive guidance, legislation, and research to protect and advance the retirement security of our nation's workers and retirees.

[1] Based on 2005 filings of the Form 5500.

Title I of ERISA establishes standards of fiduciary conduct for persons who are responsible for the administration and management of benefit plans. It also establishes standards for the reporting of plan related financial and benefit information to the Department, the IRS and the Pension Benefit Guaranty Corporation (PBGC), and the disclosure of essential plan related information to participants and beneficiaries.

**The Fiduciary's Role**

ERISA requires plan fiduciaries to discharge their duties solely in the interest of plan participants and beneficiaries, and for the exclusive purpose of providing benefits and defraying reasonable expenses of plan administration. In discharging their duties, fiduciaries must act prudently and in accordance with the documents governing the plan. If a fiduciary's conduct fails to meet ERISA's standards, the fiduciary is personally liable for plan losses attributable to such failure.

ERISA protects participants and beneficiaries, as well as plan sponsors, by holding plan fiduciaries accountable for prudently selecting plan investments and service providers. In carrying out this responsibility, plan fiduciaries must take into account relevant information relating to the plan, the investments available under the plan, and the service provider, and are specifically obligated to consider fees and expenses.

ERISA prohibits the payment of fees to service providers unless the services are necessary and provided pursuant to a reasonable contract, and the plan pays no more than reasonable compensation. Thus, plan fiduciaries must ensure that fees paid to service providers and other expenses of the plan are reasonable in light of the level and quality of services provided. Plan fiduciaries must also be able to assess whether revenue sharing or other indirect compensation arrangements create conflicts of interest on the part of the service provider that might affect the quality of the services to be performed. These responsibilities are ongoing. After initially selecting service providers and investments for their plans, fiduciaries are required to monitor plan fees and expenses to determine whether they continue to be reasonable and whether there are conflicts of interest.

**EBSA's Compliance Assistance Activities**

EBSA assists plan fiduciaries and others in understanding their obligations under ERISA, including the importance of understanding service provider fees and relationships, by providing interpretive guidance[2] and making related materials available on its Web site. One such publication developed by EBSA is *Understanding Retirement Plan Fees and Expenses*, which provides general information about plan fees and expenses. In conjunction with the Securities and Exchange Commission, we also developed a fact sheet, "Selecting and Monitoring Pension Consultants – Tips for Plan Fiduciaries." This fact sheet contains a set of questions to assist plan fiduciaries in evaluating the objectivity of pension consultant recommendations.

EBSA also has made available on its Web site a model "401(k) Plan Fee Disclosure Form" to assist fiduciaries of individual account pension plans when analyzing and comparing the costs associated with selecting service providers and investment products. This form is the product of a coordinated effort of the American Bankers Association, Investment Company Institute, and the American Council of Life Insurers.

To help educate plan sponsors and fiduciaries about their obligations under ERISA, EBSA conducts numerous educational and outreach activities. Our campaign, "Getting It Right – Know Your Fiduciary Responsibilities," includes nationwide educational seminars to help plan sponsors understand the law. The program focuses on fiduciary obligations, especially related to the importance of selecting plan service providers and the role of fee and compensation considerations in that selection process. EBSA has conducted 26 fiduciary education programs since May 2004 in different cities throughout the United States. EBSA also has conducted 58 health benefits education seminars, covering nearly every state, since 2001. Beginning in February 2005, these seminars

[2] *See, e.g.*, Field Assistance Bulletin 2002-3 (November 5, 2002) and Advisory Opinions 2003-09A (June 25, 2003), 97-16A (May 22, 1997), and 97-15A (May 22, 1997).

added a focus on fiduciary responsibilities. EBSA will continue to provide seminars in additional locations under each program.

**Disclosures to Participants under Current Law**

ERISA currently provides for a number of disclosures aimed at providing participants and beneficiaries information about their plans' investments. For example, information is provided to participants through summary plan descriptions and summary annual reports. Under the Pension Protection Act of 2006, plan administrators are required to automatically furnish pension benefit statements to plan participants and beneficiaries. The Department issued Field Assistance Bulletins in December 2006 and in October 2007 to provide initial guidance on complying with the new statutory requirements. Statements must be furnished at least once each quarter, in the case of individual account plans that permit participants to direct their investments, and at least once each year, in the case of individual account plans that do not permit participants to direct their investments. Other disclosures, such as copies of the plan documents, are available to participants on request.

Additional disclosures may be required by the Department's rules concerning whether a participant has "exercised control" over his or her account. ERISA section 404(c) provides that plan fiduciaries are not liable for investment losses which result from the participant's exercise of control. A number of conditions must be satisfied, including that specified information concerning plan investments must be provided to plan participants. Information fundamental to participants' investment decisions must be furnished automatically. Additional information must be provided on request.

**EBSA Participant Education and Outreach Activities**

EBSA is committed to assisting plan participants and beneficiaries in understanding the importance of plan fees and expenses and the effect of those fees and expenses on retirement savings. EBSA has developed educational brochures and materials available for distribution and through our Web site. EBSA's brochure entitled *A Look at 401(k) Plan Fees for Employees* is targeted to participants and beneficiaries of 401(k) plans who are responsible for directing their own investments. The brochure answers frequently asked questions about fees and highlights the most common fees, and is designed to encourage participants to make informed investment decisions and to consider fees as a factor in decision making. Last fiscal year, EBSA distributed over 5,400 copies of this brochure, and over 46,000 visitors viewed the brochure on our Web site.

More general information is provided in the publications, *What You Should Know about Your Retirement Plan* and *Taking the Mystery out of Retirement Planning*. In the same period, EBSA distributed over 86,000 copies of these two brochures, and almost 102,000 visitors viewed these materials on our Web site. EBSA's *Study of 401(k) Plan Fees and Expenses*, which describes differences in fee structures faced by plan sponsors when they purchase services from outside providers, is also available.

**Regulatory Initiatives**

EBSA has completed one initiative and currently is finalizing two others to improve the transparency of fee and expense information to participants, plan sponsors and fiduciaries. We began these initiatives, in part, to address concerns that participants are not receiving information in a format useful to them in making investment decisions, and that plan fiduciaries are having difficulty getting needed fee and compensation arrangement information from service providers to fully satisfy their fiduciary duties. The needs of participants and plan fiduciaries are changing as the financial services industry evolves, offering an increasingly complex array of products and services.

- Disclosures to Participants

On April 25, 2007, the Department published a Request for Information, inviting suggestions from plan participants, sponsors, service providers, consumer advocates and others for improving the current disclosures applicable to participant-directed individual account plans. In response to this request, the Department received more than 100 comment letters from a variety of interested parties. Drawing on these comments, the Department developed a proposed rule that will, upon adoption, require fiduciaries of all participant-directed individual account plans – not just plans electing to comply with section 404(c) – to furnish to the plan's participants and beneficiaries important plan and investment-related information. This proposed regulation, published in the July 23, 2008 Federal Register, will ensure that all participants who are responsible for making investment decisions under their plan receive understandable information about their plan and the investments offered thereunder, including information about the fees and expenses that directly affect their retirement savings.

A major challenge in developing the proposal was determining precisely what information plans should be required to disclose to participants. Many commenting on the Request for Information encouraged the Department to keep in mind that, while appropriate disclosures are helpful, simply mandating the disclosure of page after page of legal jargon is actually contrary to the interests of participants, as the quantity of information may be overwhelming to participants and the benefits may not justify the cost, which are likely to be charged against the accounts of participants. Our proposal adopts a disclosure framework that favors quality over quantity, providing plan participants with concise, useful information in a format that facilitates comparative judgments between plans' investment options.

Specifically, the proposal would require that participants be furnished, upon enrollment and at specified intervals thereafter, two general categories of information— "plan-related information" and "investment-related information."

Plan-related information primarily encompasses administrative expenses of the plan, such as legal and accounting fees, and expenses related to the actions of a specific participant,

such as a loan processing fee. In addition to requiring descriptions of what and how these fees and expenses are assessed, to be furnished upon enrollment and at least annually thereafter, the proposal requires that the amounts actually charged against a participant's account for such expenses be disclosed quarterly, noting that this quarterly disclosure requirement could be satisfied by including the required information on the participant's quarterly benefit statement.

With respect to investment-related information, the proposal provides for the disclosure of specific information regarding each designated investment option and that such information be disclosed in a form that facilitates comparisons of investments. The proposal also includes a model comparative disclosure form. The specific investment-related information required to be disclosed under the proposal includes:

- The name of each investment option, type or category of the investment (e.g., money market fund, balanced fund, etc.), and whether the investment is actively or passively managed.

- Information about the performance of each investment over 1, 5, and 10 year periods.

- Benchmarks against which each investment may be compared in terms of performance.

- Fee and expense information with respect to each investment – specifically, the total operating expenses, and any shareholder-type fees that might charged directly against the participant's investment.

In addition, a Web site address is required to be provided with respect to each designated investment option for those participants who want additional information about their investment choices. The website would, at a minimum, make available information

concerning the principal investment strategies, attendant risks, investments comprising the portfolio, portfolio turnover, etc. – similar to the information that would be contained in more detailed prospectuses.

The comment period on the proposal closed on September 8th. Although we have not yet finished reviewing all of the comment letters, let me just say that we are pleased to see that so many stakeholders under ERISA support simple and short communications between plans and participants as the most helpful and meaningful.

- Disclosures to Plan Fiduciaries

On December 13, 2007, EBSA issued a proposed regulation amending its current regulation under ERISA section 408(b)(2) to clarify the information fiduciaries must receive and service providers must disclose for purposes of determining whether a contract or arrangement is "reasonable," as required by ERISA's statutory exemption for service arrangements. Our intent is to ensure that service providers entering into or renewing contracts with plans disclose to plan fiduciaries comprehensive and accurate information concerning the providers' receipt of direct and indirect compensation or fees and the potential for conflicts of interest that may affect the provider's performance of services. The information provided must be sufficient for fiduciaries to make informed decisions about the services that will be provided, the costs of those services, and potential conflicts of interest based on fees or compensation. The Department believes that such disclosures are critical to ensuring that contracts and arrangements are "reasonable" within the meaning of the statute. Public comments on the proposed regulation are currently under review and we are working on developing a final regulation.

- Disclosures to the Public

On, November 16, 2007, EBSA promulgated a final regulation revising the Form 5500 Annual Report filed with the Department to complement the information obtained by

plan fiduciaries as part of the service provider selection or renewal process. The Form 5500 is a joint report for the Department of Labor, Internal Revenue Service and PBGC that includes information about the plan's operation, funding, assets, and investments. The Department collects information on service provider fees through the Form 5500 Schedule C.

Consistent with recommendations of the ERISA Advisory Council Working Group, the Department published a final regulation amending the Form 5500, including changes that expand the service provider information required to be reported on the Schedule C. The changes more specifically define the information that must be reported concerning the "indirect" compensation service providers received from parties other than the plan or plan sponsor, including revenue sharing arrangements among service providers to plans. The changes to the Schedule C were designed to assist plan fiduciaries in monitoring the reasonableness of compensation service providers receive for services and potential conflicts of interest that might affect the quality of those services.

We intend that the changes to the Schedule C will work in tandem with our 408(b)(2) initiative. The amendment to our 408(b)(2) regulation will provide up front disclosures to plan fiduciaries, and the Schedule C revisions will reinforce the plan fiduciary's obligation to understand and monitor these fee disclosures. The Schedule C remains a requirement for plans with 100 or more participants, which is consistent with long-standing Congressional direction to simplify reporting requirements for small plans.

**EBSA's Enforcement Efforts**

EBSA has devoted enforcement resources to this area, seeking to detect, correct and deter violations such as excessive fees and expenses, and failure by fiduciaries to monitor on-going fee structure arrangements. From FY 1999 through August 2008, we closed 674 401(k) investigations involving these issues, with monetary results of over $131 million.

In carrying out its enforcement responsibilities, EBSA conducts civil and criminal investigations to determine whether the provisions of ERISA or other federal laws related to employee benefit plans have been violated. EBSA regularly works in coordination with other federal and state enforcement agencies, including the Department's Office of the Inspector General, the Internal Revenue Service, the Department of Justice (including the Federal Bureau of Investigation), the Securities and Exchange Commission, the PBGC, the federal banking agencies, state insurance commissioners, and state attorneys general.

EBSA is continuing to focus enforcement efforts on compensation arrangements between pension plan sponsors and service providers hired to assist in the investment of plan assets. EBSA's Consultant/Adviser Project (CAP), created in October 2006, addresses conflicts of interest and the receipt of indirect, undisclosed compensation by pension consultants and other investment advisers. Our investigations seek to determine whether the receipt of such compensation violates ERISA because the adviser or consultant used its status with respect to a benefit plan to generate additional fees for itself or its affiliates. The primary focus of CAP is on the potential civil and criminal violations arising from the receipt of indirect, undisclosed compensation. A related objective is to determine whether plan sponsors and fiduciaries understand the compensation and fee arrangements they enter into in order to prudently select, retain, and monitor pension consultants and investment advisers. CAP will also seek to identify potential criminal violations, such as kickbacks or fraud.

**Concerns Regarding Legislative Proposals**

While I am pleased that the Department's regulatory initiatives and the legislative proposals introduced in Congress share the common goal of providing increased transparency of fee and expense information, I am concerned that legislative action could disrupt the Department's ongoing efforts to provide these important disclosures. Proposed legislation may not achieve the primary goal of participant disclosures –

providing workers with useful and concise information – by mandating very detailed and costly disclosure documents. Excessively detailed disclosures are likely to be ignored by participants even as those participants bear the potentially significant cost of their preparation and distribution. Participants are most likely to benefit from concise disclosures that allow them to meaningfully compare the investment options in their plans. The Department has received many comments highlighting the importance of brevity and relevance in disclosures to participants. The regulatory process is well-suited to resolving the many technical issues arising as we seek to strike the proper balance in providing participants with cost effective, concise, meaningful information.

I am also concerned by proposals suggesting that specific investment options should be mandated. Requiring specific investment options would limit the ability of employers and workers together to design plans that best serve their mutual needs in a changing marketplace.

**Conclusion**

Mr. Chairman and Members of the Committee, thank you for the opportunity to testify before you today. The Department is committed to ensuring that plans and participants pay fair, competitive and transparent prices for services that benefit them – and to combating instances where fees are excessive or hidden. We are moving as quickly as possible consistent with the requirements of the regulatory process to complete our disclosure initiatives, and we believe they will improve the retirement security of America's workers, retirees and their families. I will be pleased to answer any questions you may have.