



# AMERICAN BENEFITS COUNCIL

June 5, 2009

## SUGGESTED MODIFICATIONS TO H.R. 1984, THE 401(K) FAIR DISCLOSURE FOR RETIREMENT SECURITY ACT OF 2009

The American Benefits Council supports improvement to the rules regarding plan fee disclosure. Effective plan fee disclosure to participants can enable them to understand their options and to choose investments available in their plans that are best suited to their personal circumstances. Disclosure to plan fiduciaries enables them to evaluate the reasonableness of the fees that are charged by their current providers and to shop for and negotiate services and fees from current and other providers.

While plan fiduciaries are already receiving extensive information regarding various plan services and related fees and are using that information to negotiate effectively for lower fees, we believe more can and should be done to make that process even more effective. And while service providers are providing fiduciaries with tools that enable them to analyze fee levels and to provide meaningful information to participants, we believe more can be done to improve that exchange as well.

Chairman Miller previously introduced H.R. 3185, a bill that addressed both the disclosure of plan fees by a service provider to a plan administrator and the disclosure of plan fees by a plan administrator to participants. We very much appreciate the open and constructive approach that the Committee used in amending H.R. 3185 prior to its approval by the Committee last year. The revised bill, which has been reintroduced as H.R. 1984, included many very significant improvements to the proposed legislation.

**Litigation issues.** This document focuses on two key issues related to H.R. 1984. First and most importantly, Council members are extremely concerned about the significant increase in litigation in the defined contribution area over the last several years. The threat of unfounded litigation and the corresponding legal fees and settlement costs are becoming an enormous burden on the system. If unchecked these threats will clearly lead to fewer plans, lower benefits, and higher costs, exactly the

opposite of the purposes of the bill. Accordingly, this document identifies critical rules that are needed to control unfounded litigation attributable to plan fees.

**Coordination of legislative and regulatory processes.** Second, in the effort to improve the fee disclosure rules, we believe that it is very important that the legislative and regulatory processes be coordinated. For example, it would be very harmful for the retirement plan system if (1) fee disclosure regulations were issued this year, effective for 2010, (2) fee disclosure legislation were enacted, effective for 2011, and (3) regulations interpreting such legislation were issued, effective for 2012, a scenario that could very well occur. The additional programming and data collection costs caused by such events would be enormous, not to mention the resulting confusion among participants and plan fiduciaries. Such cost would, of necessity, be absorbed by plan participants and/or plan sponsors. Many plan sponsors would react by reducing their contributions to their plans or passing on the increased costs to participants directly. Plan participants would simply receive smaller benefits, which is not what anyone wants. Especially at this time, neither employers nor employees can afford such additional financial burdens.

Accordingly, it is critical that Congress and the Department of Labor consider how best to coordinate their efforts to avoid these adverse consequences. Below, we offer one specific proposal in that regard.

### **Litigation Issues.**

**Issue I. Plan sponsors and other fiduciaries cannot be expected to investigate and audit fee disclosure information provided by service providers unless the information is clearly questionable on its face.** Plan sponsors cannot audit fee information provided by service or investment providers. For example, it would be clearly impractical for a plan sponsor to audit a mutual fund to determine if its reported expense ratio is accurate. If such an audit requirement were to exist, no plan sponsor could afford to maintain a plan. Inevitably, however, some of the information provided will be incorrect due to inadvertent errors. If the plan sponsor or the participants act on the erroneous information, this should not expose the plan sponsor to liability. To have a workable system, a plan sponsor that reasonably relies on service provider information should not have any liability. H.R. 1984 needs to address this critical issue.

**Issue II. Employers need legal protection from claims that they should have obtained or disclosed additional fee information.** The recent focus on fees will undoubtedly result in more litigation unless it is made clear that, by obtaining and disclosing the comprehensive information required by H.R. 1984, plan fiduciaries will have satisfied their fiduciary duties with respect to the amount of fee information that they should obtain and disclose. Of course, if it is clear on the face of the information provided that additional information is needed, then plan fiduciaries should have a duty to seek such additional information.

**Suggested statutory changes for Issues I and II:**

**Page 11, line 4.** This line would be revised to read as follows:

RULES.—

(A) IN GENERAL.—Except as provided in this paragraph, nothing in this subsection affects the obli-

**Page 11, between lines 6 and 7.** The following would be inserted:

(B) RELIANCE.— A fiduciary of an individual account plan shall not have any liability under this title solely by reason of exclusive reliance on, or exclusive use of, information provided by a third party service provider under this section unless—

- (1) such fiduciary has actual knowledge that such information is inaccurate or incomplete, or
- (2) such information is clearly inaccurate or incomplete on its face, and any reasonable fiduciary would recognize such inaccuracy or incompleteness without investigation.

**Issue III. Like plan sponsors, service providers should not have a duty to investigate and audit fee information provided by their service providers unless the information is clearly questionable on its face.** As in the case of plan sponsors, if service providers had to audit information provided to them by their service providers, plans would be unaffordable. There is a provision in H.R. 1984 that is intended to address this issue, but the provision needs modifications. First, the provision limits reliance to information provided by regulated entities. There are a large number of unregulated entities involved in providing services to plans, such as third party administrators. Second, the language of H.R. 1984 strongly suggests that there is a duty to investigate and audit in many cases. That would produce an unworkable system.

**Suggested statutory changes:**

**Page 5, lines 4-5.** The following would be deleted: “which is regulated by the Federal Government or a State”.

**Page 5, lines 7-15.** This material would be revised to read as follows:

of such information unless—

(A) the service provider has actual knowledge that the information is inaccurate or incomplete, or

(B) such information is clearly inaccurate or incomplete on its face, and any reasonable fiduciary would recognize such inaccuracy or incompleteness without investigation.

**Issue IV. A fiduciary's duty in evaluating unbundled information needs to be clarified.** Under the bill, a bundled service provider must disclose separate fees for administrative and investment services, even if the bundled service provider does not offer such services separately. If the services are not offered separately, it is unclear what a plan sponsor is supposed to do with the information received. The information on the services in a bundled package does not directly compare to unbundled investment and administrative services since the services in the bundled package are not sold separately. It seems that the most reasonable solution would be to compare the total cost of the bundled services with the total cost of the unbundled services. Plan sponsors need clarification that this action will satisfy their fiduciary duties in this regard.

**Suggested statutory change:**

**Page 11, between lines 6 and 7 (after the material described above that is also inserted here).**

(C) SPECIAL RULE—

(i) A fiduciary of an individual account plan that receives the allocation described in paragraph (2) with respect to a service provider shall not be treated as failing to satisfy its duties under section 404 solely by reason of performing such duties in the manner described in clause (ii).

(ii) If the service provider providing the allocation described in paragraph (2) will not provide to the plan certain services separately, but will only provide such services to the plan on a combined basis, then the fiduciary may, in evaluating the reasonableness of the fees charged by the service provider for such services, base the evaluation on the total charges for such services, notwithstanding the fact that such charges are described in separate subparagraphs of paragraph (2).

**Issue V. Inadvertent errors should not result in company-threatening liability.** Assume, for example, that an inadvertent error is made whereby the fees associated with an investment option are reported as 25 basis points, when the fees were actually 29 basis points. Assume further that following such error, the market has a downturn similar to the one recently experienced. Could all participants who had invested in that option bring an action claiming that, if they had known the real fee level, they would have elected to invest in the plan's capital preservation option, thereby avoiding tens of millions of dollars of losses? This scenario could, by itself, put a fiduciary out of

business. Safeguards are needed to ensure that liability does not spiral out of control and that sponsors do not have an incentive to terminate their plans to avoid such potential liabilities.

**Suggested statutory change:**

**Page 26, between lines 22 and 23:** The following would be inserted (and “(d)” on line 23 would be changed to “(e)”, and “(e)” on line 3 of page 27 would be changed to “(f)”):

(d) LIABILITY.—

(1) IN GENERAL.—The Secretary of Labor is directed to prescribe regulations clarifying the issues described in paragraph (3).

(2) CLAIMS.—This subsection shall apply to any claim for any type of relief based on an allegation that erroneous fee information provided to participants and beneficiaries caused a participant or beneficiary to select an investment option under an individual account plan and such investment option performed less well than another option that could have been chosen. However this subsection shall not apply to any error that is intentional or attributable to willful neglect.

(3) RELIEF.—With respect to any participant or beneficiary, no relief shall be granted under the Employee Retirement Income Security Act of 1974 with respect to any claim described in paragraph (2) in the absence of individualized evidence that such participant or beneficiary relied on the erroneous fee information in selecting the investment option instead of another specified investment option.

**Coordination Issues.**

**Issue VI. Coordination of legislative and regulatory processes.** As noted, it is very important that legislative and regulatory processes be coordinated to avoid unnecessary costs and confusion resulting from having to change systems multiple times. Accordingly, it is critical that the Department of Labor be directed to issue final regulations under H.R. 1984 by a specified date and that H.R. 1984 not apply to contracts for services entered into prior to plan years beginning at least 12 months after such specified date.

**Suggested statutory change:**

**Page 27, lines 3-6.** This material would be revised to read as follows:

(f) EFFECTIVE DATE.—

- (1) IN GENERAL.—Except as otherwise provided in this subsection, the amendments made by this section shall apply to contracts for service entered into in plan years beginning after the date that is two years after the date of enactment of this Act.
- (2) REGULATIONS.—Within one year after the date of enactment of this Act, the Secretary of Labor shall issue final regulations with respect to the amendments made by this section.
- (3) SPECIAL RULE.—Subsection (d) shall take effect on the date of enactment of this Act.