INVESTMENT COMPANY INSTITUTE

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August 19, 2010

Mr. G. Christopher Cosby
Department of Labor
Employee Benefits Security Administration
200 Constitution Avenue, NW
Washington, DC 20210

RE: Form 5500, Annual Return/Report of Employee Benefit Plan

Dear Mr. Cosby:

The Investment Company Institute[1] is pleased to respond to the Department of Labor's request for comment under the Paperwork Reduction Act on the usefulness and burden of the Form 5500 information collection. Our comments relate principally to the revised Schedule C.

The Institute and its members have a strong interest in ensuring that the Form 5500 information collection is clear to those who provide information for the form and understandable for the members of the public who use the data collected. Mutual funds are the investment vehicle of choice for defined contribution plans — representing about half of all defined contribution plan assets and about half of all 401(k) plan assets. The Institute maintains an extensive research program on retirement security, and our researchers and economists are heavy users of Form 5500 data. Our research program includes studies focusing on retirement plan fees.[2]

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[1] The Investment Company Institute is the national association of U.S. investment companies, including mutual funds, closed-end funds, exchange-traded funds (ETFs), and unit investment trusts (UITs). ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds, their shareholders, directors, and advisers. Members of ICI manage total assets of $11.18 trillion and serve almost 90 million shareholders.

[2] *See, e.g.,* Holden and Hadley, "The Economics of Providing 401(k) Plans: Services, Fees, and Expenses, 2008," *ICI Research Fundamentals*, Vol.18, No. 6 (August 2009), available at www.ici.org/pdf/fm-v18n6.pdf; Deloitte Consulting LLP and Investment Company Institute, *Defined Contribution/401(k) Fee Study* (2009); available at www.ici.org/pdf/rpt_09_dc_401k_fee_study.pdf. ICI's fee research is frequently cited by the Department.

We recommend that the Department harmonize the requirements of Schedule C of Form 5500 with the new 408(b)(2) service provider disclosure regulation. In particular, we suggest the Department allow the Schedule C requirements for mutual funds and similar pooled investments to be satisfied by using the information required by the 408(b)(2) regulation, in lieu of the current Schedule C "eligible indirect compensation" disclosure.

Background of Schedule C Revisions

Schedule C of Form 5500 is designed to provide fiduciaries, participants, regulators, and the public meaningful information about a plan's fees and compensation paid to service providers. The form and its instructions should provide clear guidance to plan administrators about what Form 5500 requires, should clearly indicate the information that service providers need to provide to plan administrators, and should match, where possible, the information that plans and their service and investment providers create for other regulatory purposes.

The Schedule C revision was one of three projects the Department began in 2007 to enhance the disclosure of fees and other compensation of plans and was completed first. Ideally, the Schedule C revision should have been adopted last, because Form 5500 filing occurs at the end of the process of hiring and monitoring plan service providers, but the Department completed the Schedule C revision at the time it moved Form 5500 to a completely electronic system under EFAST2.

In the final rule, the Department applied Schedule C reporting to services provided *indirectly* to obtain disclosure when a plan makes an investment in a mutual fund or similar pooled product, whether or not the fund holds "plan assets" under ERISA. Mutual funds have dozens—sometimes hundreds—of service providers, none of whom has any idea the extent to which particular employee benefit plans are invested in the mutual fund.

Recognizing the complexity and burden of subjecting service providers to investment products to Schedule C reporting, the Department created an alternative reporting option for "eligible indirect compensation" (EIC). In order to qualify as EIC, the indirect compensation must be fees or expense reimbursement payments charged to "investment funds" and reflected in the value of the investment or return on investment of the participating plan or its participants, finders' fees, "soft dollar" revenue, float revenue, and/or brokerage commissions or other transaction-based fees for transactions or services involving the plan. In addition, the plan administrator must receive a disclosure of (a) the existence of the indirect compensation; (b) the services provided for the indirect compensation or the purpose of

the payment of the indirect compensation; (c) the amount (or estimate) of the compensation or a description of the formula used to calculate or determine the compensation; and (d) the identity of the party or parties paying and receiving the indirect compensation. This disclosure is commonly referred to as the EIC disclosure.

The Department has issued 67 questions and answers in two sets of FAQs clarifying the new Schedule C requirements; around two dozen of these relate to the application of EIC with respect to mutual funds and payments from mutual funds to others.[3] These FAQs narrow the categories of service providers to mutual funds subject to Schedule C reporting. The mutual fund industry, nevertheless, continues to struggle to provide plan administrators and those entities assisting them the information necessary to complete Form 5500. DOL's guidance allows existing mutual fund disclosure documents, which are required and regulated by SEC rules, such as the fund's prospectus, statement of additional information, and shareholder reports, to satisfy the EIC disclosures if the documents contain the required EIC disclosure and a reasonable plan administrator can readily determine this information from the documents.

Our conversations with Institute members indicate a lack of consensus on whether existing mutual fund disclosure documents in all cases contain the information required for EIC disclosure. Differences in how Schedule C is interpreted, differences in how funds operate, and differences in the relationships funds have with recordkeepers all contribute to this lack of consensus. As a result, there has been considerable confusion among plan recordkeepers (who collect information to assist a plan administrator in completing Form 5500) and mutual funds about exactly what information recordkeepers may need in addition to existing disclosure documents. We expect that the information and documents mutual funds will provide to plans will not be consistent across the industry. For example, following the guidance in FAQ # 29, many funds have created a "roadmap" document that alerts plans to where in the fund's prospectus, statement of additional information, or shareholder report the EIC information can be found, and provides any other additional information not contained in these documents (e.g. the EIN of the fund's adviser) the fund believes may be needed by the plan.[4]

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[3] *See* FAQs About the 2009 Form 5500 Schedule C (http://www.dol.gov/ebsa/faqs/faq_scheduleC.html) and Supplemental FAQs About the 2009 Schedule C (http://www.dol.gov/ebsa/faqs/faq-sch-C-supplement.html).

[4] The Institute created a compliance template to assist our members in providing information to plans and recordkeepers, but this template is not intended, and has not been used, as a form that every mutual fund complex could fill out as is. Because of the variety of fund fee structures and differing interpretations of the Form 5500 requirements, the template has been used primarily as a reference tool to identify and clarify what information funds may need to provide in connection with Schedule C.

Other fund companies have concluded that their prospectus satisfies the EIC requirements. Still others work directly with recordkeepers on an ad hoc basis to respond to specific information needs from plans or their recordkeepers.

If an item of compensation qualifies as EIC, it will not appear on Schedule C; the only information disclosed on Schedule C is the identity of the party providing the EIC disclosure. In these cases, Schedule C may not provide participants, the government, or the public any information about a significant portion of plans' expenses.[5] Moreover, even if the EIC narrative disclosures were included on the Schedule C, the usefulness of the reporting would be limited because the complex Schedule C rules result in information that cannot easily be compared from investment to investment or from plan to plan.

Interim Final 408(b)(2) Regulations

The interim final regulations under ERISA section 408(b)(2) that the Department adopted in July include a reporting structure that is similar to what occurs now in preparation of Form 5500—the plan's recordkeeper or similar service provider serves as a conduit of fee information related to plan investments. In the interim final 408(b)(2) regulations, the Department requires that, with respect to each designated investment alternative, the responsible plan fiduciary be provided:

(1) A description of any compensation that will be charged directly against the amount invested in connection with the acquisition, sale, transfer of, or withdrawal from the investment contract, product, or entity (e.g., sales loads, sales charges, deferred sales charges, redemption fees, surrender charges, exchange fees, account fees, and purchase fees);
(2) A description of the annual operating expenses (e.g., expense ratio) if the return is not fixed; and
(3) A description of any ongoing expenses in addition to annual operating expenses (e.g., wrap fees, mortality and expense fees).

In the case of an investment that holds plan assets and in which the plan has a direct equity investment, the fiduciary providing services to that investment will provide the required disclosure to a responsible plan fiduciary unless the plan's recordkeeper or broker has already provided the

[5] The EIC disclosures can assist a fiduciary in fulfilling the fiduciary's duties under ERISA, but that is not the primary purpose of the reporting scheme in Part 1 of Subtitle B of Title I of ERISA.

information. In the case of mutual funds and other non-plan asset vehicles, the recordkeeper or broker offering access to the investments will provide the required information. The recordkeeper or broker may satisfy this requirement by providing current disclosure materials of the issuer of the investment that include the fee information, provided that the issuer is not an affiliate, the disclosure materials are regulated by a State or federal agency, and the covered service provider does not know that the materials are incomplete or inaccurate.

We believe that the 408(b)(2) regulation generally takes the right approach to the reporting structure and data points and will facilitate comparisons among investments. The pieces of information required by the 408(b)(2) regulation with respect to mutual funds are readily ascertainable.[6] The first two pieces of information — charges for purchasing or redeeming the fund and the expense ratio — are disclosed at the beginning of a fund prospectus or summary prospectus. (The third piece of information — ongoing expenses like wrap fees and mortality and expense charges in addition to the expense ratio — typically does not apply to mutual funds.[7]) The fee information disclosed in fund prospectuses is captured and disseminated by numerous data services like Morningstar and readily available on the Internet, including on the SEC's website. Securities laws and SEC rules require that mutual funds maintain and update these numbers. The fund's expense ratio is widely understood by investors, calculated on a consistent basis, and provides the best picture of the ongoing costs of investing in a mutual fund.

Recommendation

In our view, the information required by the interim 408(b) final regulation with respect to mutual funds provides fiduciaries, participants, regulators, and the public with more meaningful information about fund fees than the information currently required by the Form 5500 Schedule C instructions. This conclusion is based on our experience in helping the fund industry understand and comply with Schedule C and as users of Form 5500 data and researchers on the topic of mutual fund and retirement plan fees.

We recognize, however, that mutual fund companies and recordkeepers both have invested considerable expense to comply with new Schedule C. As stated earlier, some funds have created

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[6] Non-registered investments now will be required to calculate and disclose the same information to satisfy the 408(b)(2) rule, making this information readily available to plans.

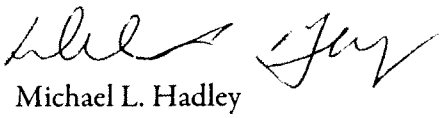
[7] Other products like insurance products and separate accounts could have these charges. We understand that providers generally disclose these fees, but if they do not currently, they will need to once the 408(b)(2) regulation is effective.

customized EIC disclosures or responded in detail to requests for information from plan recordkeepers. Radically altering Form 5500 requirements for the 2009 or 2010 plan year filings could result in more confusion and unnecessary expense. Accordingly, we would recommend that, for the 2009, 2010, and perhaps 2011 filing years, the Department allow a plan administrator to comply with Schedule C requirements with respect to mutual funds in which the plan invests by using either EIC disclosures or 408(b)(2) disclosures.

In the longer term,[8] we recommend that the Department consider revising Schedule C and its accompanying instructions so that the information plans receive for purposes of 408(b)(2) would be reported on Schedule C. This approach will provide more meaningful information to plan administrators and would lower ongoing compliance costs and reduce confusion. Most importantly, it will enhance Schedule C's effectiveness as a tool for participants, the Department, and the public to understand and evaluate the costs plans incur.

Please feel free to contact the undersigned (202.326.5810 or mhadley@ici.org) or Mary Podesta (202.326.5826 or podesta@ici.org) if you have further questions.

Sincerely,



Michael L. Hadley

cc: Ian Dingwall, Chief Accountant
Robert Doyle, Director of Office of Regulations and Interpretations

[8] We would suggest the 2012 plan year as an appropriate time for revisiting this. Assuming the Department does not extend the 408(b)(2) effective date, the 2012 plan year is the first for which the 408(b)(2) regulation will be in effect for the whole year.