



1401 H Street, NW, Washington, DC 20005-2148, USA
202/326-5800 www.ici.org

Paul Schott Stevens, PRESIDENT & CEO

202/326-5901 FAX: 202/326-5806
paul.stevens@ici.org

July 16, 2009

The Honorable Phyllis Borzi
Assistant Secretary
Office of the Assistant Secretary
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, DC 20210

Dear Ms. Borzi:

Congratulations on your confirmation as Assistant Secretary of Labor for Employee Benefits Security. The Investment Company Institute¹ and its members look forward to working with you in advancing the interests of America's workers as they save for retirement.

I am writing to underscore the mutual fund industry's commitment to the continued success of 401(k) plans and other defined contribution savings arrangements and to highlight our interest in a number of matters that likely will be priorities for the Department.

The mutual fund industry wholeheartedly supports efforts to assure the continued success of 401(k) plans and other defined contribution savings arrangements in helping participants achieve retirement security. Defined contribution plans now serve as the primary vehicle for private-sector employer-based retirement savings in the United States. Approximately half of defined contribution plan assets are invested in mutual funds and many mutual fund organizations provide recordkeeping and administrative services to defined contribution plans.

The financial crisis has affected defined contribution plans, as plan participants, like all investors, experienced declines in their accounts. While the 401(k) system has been tested by the economic downturn, it remains sound. As the Institute testified on February 24, 2009 before the House Committee on Education and Labor, research from many sources shows that plan participants have not

¹ The Investment Company Institute (ICI) is the national association of the U.S. mutual fund industry, which manages about half of 401(k) assets and advocates policies to make retirement savings more effective and secure.

panicked and moved or withdrawn their money en masse. Rather, they continue to contribute to their plans, and are in a position to benefit when markets rebound. Research by the Institute also finds that Americans continue to value defined contribution plans and IRAs and do not want the government to take away the tax benefits afforded to retirement saving or to dictate investments for retirement accounts. (A copy of the Institute's February 24 testimony is attached.)

At the same time, the Institute and its members believe there are a number of steps the Department of Labor could take in the administration of ERISA to strengthen the operation of defined contribution plans in the interests of participants and that it is worthwhile to consider how to expand the number of American workers who have access to convenient workplace retirement savings programs. We recommend that the Department:

- Complete the 401(k) disclosure reform agenda.

The Department should adopt final regulations on plan service provider disclosure and participant disclosure, with a goal of making the disclosure concise and focused on information that is useful to employers and participants in making decisions. In our view, this means the employer disclosure regulation should cover indirect compensation but not require disclosure about how payments are allocated internally. The regulation also should look to plan recordkeepers to be conduits of information about product fees, because investment products generally do not have direct relationships with plans. Participants in all 401(k) plans should receive key information about all investments on the plan menu in a format that allows comparison. When the service provider disclosure regulation is completed, the Department should fine-tune Form 5500 Schedule C.

- Modernize the rules for electronic delivery of information to participants.

Since the Department's 2002 regulation on electronic delivery was adopted, Internet usage has become virtually universal among a significant majority of plan participants. We believe the Department should amend the electronic delivery rule to allow participants to opt out of electronic delivery, rather than requiring that they opt in.

- Encourage increased use of automatic features in plans to enroll participants, escalate contributions, and diversify participant accounts.

Automatic features are important developments in plan design and for many participants can be the most influential factors in accumulating adequate retirement savings. We encourage the Department to promote the use of automatic enrollment and automatic escalation and to consider rulemaking to allow plan sponsors to automatically diversify participants out of large concentrations of employer stock as they approach retirement age. In addition, we believe the framework of the Department's QDIA regulation is sound and we recommend against reversing course based on the experience of one highly unusual short-term period in the market.

- Work with the SEC to address any issues concerning disclosure and marketing of target date funds.

Target date funds seek to avoid common investment mistakes by providing professionally designed asset allocation models that rebalance and adjust the asset allocation mix overtime. Although we believe that the regulatory framework under ERISA and the securities laws adequately protect target date mutual fund investors, and that current disclosures are good, we think it is appropriate for regulators and the industry to review whether any improvements to disclosure should be made. A working group of Institute members developed a set of disclosure principles for target date funds which are attached.

- Encourage government and private-sector initiatives to expand financial literacy.

Helping savers understand investing concepts is a task for plan sponsors, service and investment providers, educators and national and local government. The Department should continue its leadership role in expanding financial literacy. We believe the Department also should explore harnessing new media to promote investor education and work with the SEC to facilitate delivery of information to non-English speaking plan participants in a manner that meets their needs.

- Provide certainty with respect to investment advice programs.

The Department has delayed implementation of the investment advice regulation adopted under the Bush Administration. While we believe the regulation appropriately resolved ambiguities in the language of the Pension Protection Act, we recognize that the Obama Administration may revisit this issue. In so doing, the Department should adopt policies that promote the provision of investment advice and, at a minimum, preserve pre-PPA guidance on computer and fee leveled advice programs, on which many plans now successfully rely.

- Explore with Treasury how to encourage more employers to offer workplace plans.

We support efforts to increase access to workplace savings arrangements and are pleased that the Obama Administration has made this a priority. We hope this effort will explore ways to encourage more employers to voluntarily offer retirement plans to their employees. In addition, in developing its Automatic IRA proposal, we urge the Administration to consider alternatives to building a new government bureaucracy for administering or investing Automatic IRA assets. Retirement Bonds, or R-Bonds, are a preferable and workable alternative in this regard.

Attached is a short white paper providing more information on our recommendations.

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The Institute and its members look forward to working closely with you and the Department in developing appropriate and effective regulatory policies in all these areas. I would welcome the opportunity to meet you and to convey in person our strong interest in the retirement agenda. I will call next week to request such a meeting. In the meantime, we would be happy to provide additional information on these issues or to discuss any of these matters with you or your staff.

With very best regards.

Sincerely,



Paul Schott Stevens
President & CEO

Attachments

1. Institute White Paper on Recommendations to the Department of Labor
2. Testimony of Paul Schott Stevens before the House Education and Labor Committee, February 24, 2009
3. Disclosure Principles for Target Date Funds

**Investment Company Institute
Recommendations to the Department of Labor
July 16, 2009**

Recommendations of the Investment Company Institute to the Department of Labor
July 16, 2009

401(k) Disclosure Reform

There is widespread agreement that the Department's rules governing 401(k) plan disclosure should be modernized. The Department previously proposed new rules governing disclosure to employers about plan service arrangements and disclosure to plan participants about plan investments and fees. The proposals recognize that employers (entering into service arrangements as plan fiduciaries) and participants (allocating their assets and selecting investments for their accounts) have different information needs. We recommend that the Department complete these important projects as soon as possible and integrate new Form 5500 reporting with the final service provider disclosure rule.

Service Provider Disclosure The proposed regulation under section 408(b)(2) of ERISA will require that plan service providers give employers comprehensive information before a contract is entered into and on an ongoing basis about the services they provide and the compensation they receive from the plan and employee accounts. The proposal correctly requires disclosure of indirect, as well as direct, compensation received by a plan recordkeeper but, also correctly, does not require disclosure about how payments are allocated internally within a business organization.

In adopting a final rule, we recommend that the Department clarify *how* the regulation requires disclosure of fees and expenses of mutual funds used in plans. When a plan contracts with a recordkeeper to receive both administrative services and access to plan investments through the recordkeeper, plan fiduciaries need information on the fees of the mutual funds used in the plan when evaluating the arrangements.

The Institute expressed concern during the comment process that the proposal could be read to make service providers to mutual funds into service providers to plans. This approach would be inconsistent with ERISA's statutory framework. Mutual funds do not hold plan assets and their advisers are not ERISA fiduciaries, although they are subject to comprehensive regulation under other laws. ~~Mutual funds hire dozens of service providers, none of which has any relationship to the investing~~ plan. Instead, as the Institute and other commenters suggested, the solution for providing mutual fund disclosures is for the Department to require that recordkeepers offering access to investment options on the recordkeepers' platform undertake to provide the responsible plan fiduciary with fee and expense information about the investment options chosen by the fiduciary. This is a routine practice now—plan recordkeepers act as conduits of information about the plan's investment menu. We have formed a working group with the American Society of Pension Professionals and Actuaries (ASPPA) to

develop information protocols to facilitate the transfer of information from investment providers to recordkeepers.

Participant Disclosure The Department proposed to require that participants receive certain key information in comparable terms about all investments in a plan. The principles underlying the proposed rule enjoy broad support, as evidenced by the letter in response to the Department's Request for Information signed by 12 groups representing both employer sponsors of defined contribution retirement plans and the financial institutions that provide services or investments to plans.¹ We think the Department's proposal appropriately uses a layered approach to ensure each participant receives key information, with more detail available online and upon request for those participants who want it.

The Institute supports the proposal and believes the Department should not make significant changes in adopting a final rule. Specifically, the Department should not require that plans create individualized dollar-based disclosures for fees that are included in investment-related expenses as some commenters suggested. It would be very expensive to design and build a system to produce this information. Mutual funds accrue expenses on a daily basis – but not on an investor by investor basis. Dollar-based disclosure would have to be produced by recordkeepers, the entities that maintain participant-specific information, and would require, among other things, that recordkeepers and plans build, maintain and audit costly systems that receive daily expense accrual information from each mutual fund on the platform, match it with each participant invested in each fund, and perform a daily calculation in order to be able to calculate a dollar amount for periodic disclosure to each participant. Because of the cost of producing and maintaining such a system, the SEC, which studied this issue, uses a fee example that shows the expenses paid on each \$1,000 invested.² If the Department believes that reducing asset-based charges into estimated dollar amounts is necessary for participants to understand the impact of fees, it also should use an illustrative example.

In addition, we recommend that the final rule retain the approach in the proposal to the disclosure of portfolio trading costs of mutual funds. That is, the final rule should not require disclosure of portfolio brokerage costs, as some have suggested. Brokerage costs are not a fee of the fund but rather reduce the fund's capital gain (or increase capital loss) on a portfolio security investment. They are only one type of trading cost, and other trading costs (such as spreads on bonds and the market impact costs of large trades) cannot be quantified; focusing only on brokerage costs provides skewed information about trading costs that may confuse or mislead investors. The portfolio turnover rate used in the proposal is the best available proxy for the transaction costs of funds, and while it is not perfect, it provides comparability. After examining the issue carefully, the SEC has determined this is the best way to alert investors to the impact trading costs may have on the fund.

Finally, we believe that if the Department considers significant changes to the proposal in the two areas described here, or any other areas, it should issue a new proposal and provide opportunity for public comment.

Form 5500 New amendments to Schedule C of Form 5500 require significant disclosure about entities the Department deems to be providing services *indirectly* to the plan, such as advisers to mutual funds and other investment funds. This treatment of investment products in Schedule C has raised a number of questions. The Q&As the Department issued in 2008 were helpful in addressing many of the open issues, but we anticipate that the plan sponsor and service provider community will have additional compliance questions for the Department. Once the 408(b)(2) rules are finalized, some adjustments to Schedule C may be needed to integrate Form 5500 reporting with the 408(b)(2) rules.

Electronic Delivery of Information to Participants

The Department should revise and modernize its electronic delivery rules. The current rule effectively conditions electronic delivery to participants and beneficiaries (collectively, participants) on obtaining their affirmative consent. The affirmative consent requirement impedes the use of electronic delivery for ERISA documents because it is cumbersome (plans must distribute consent forms, then wait until a participant returns a consent form) and produces a poor response rate (participants do not return forms).³ As a result, plans and recordkeepers often provide ERISA disclosures through non-electronic media, which is less efficient, more expensive, has a greater environmental impact, and is less timely than electronic media.⁴ Non-electronic media also lacks the versatility of electronic tools that can increase a participant's involvement in his or her plan, such as embedded links, which provide a convenient means to review other plan-related information at the time of receipt.

Internet usage has increased substantially since the Department's rule was adopted in 2002 and the Internet is widely used by a significant majority of 401(k) participants. Participants under age 60 constituted 91 percent of active 401(k) participants at the end of 2007⁵ and access to an Internet-enabled PC at home is generally above 80 percent in these age groups, based on Nielsen ratings as of May 2008.⁶ While individuals in their 60s have lower home-based Internet access rates than younger age groups (68 percent in 2008 for the 55+ plus segment based on Nielsen ratings), Internet access and use among this group has grown significantly in recent years.⁷ In addition, participants in all age groups without home-based Internet access nevertheless may be active Internet users. Virtually every public library (99.1 percent) offers free public access to the Internet.⁸

A 2008 Institute study of Americans who own mutual funds found that 75 percent of those with Internet access go online at least once a day. More than three-quarters of shareholders who go online use the Internet to access their bank or investment accounts, and 58 percent use the Internet to

obtain investment information.⁹ Our members indicate that more and more plan transactions are performed online. One large recordkeeper reported to us that in 2007, about 75 percent of investment changes by participants were made online over a plan participant website, compared with about 25 percent of changes made by phone. In fact, in 2007, 84 percent of all participant contacts with the recordkeeper were made via the participant website.

Today electronic delivery of information is commonplace for most Americans. We recommend that the Department modernize the electronic delivery rules by eliminating the affirmative consent requirement. Instead, plans should be allowed to notify participants by mail that plan communications will be delivered electronically unless the participant requests to have them delivered in paper. We believe that amending the rules to allow participants to opt out of electronic delivery, rather than requiring that they opt in, should be a priority. It will foster more efficient administration of plans and enable participants to make more effective use of the information they receive about their plans.

Use of Automatic Plan Features

Automatic enrollment and contribution escalation are among the most important developments in plan design and for many participants can be the most influential factor in accumulating adequate retirement savings. Research shows that automatic enrollment into employer-sponsored retirement plans boosts participation rates and savings.¹⁰ While employers began using automatic enrollment prior to the Pension Protection Act (PPA), the Act eliminates impediments to its adoption and encourages automatic escalation of contribution rates. We encourage the Department to continue to promote the use of automatic enrollment and automatic escalation.

We recommend that the Department also consider measures to facilitate automatic diversification. Specifically, the Department should consider rulemaking to allow plan sponsors to automatically diversify participants out of large concentrations of employer stock as they approach retirement age. While the PPA established the right of employees to diversify out of employer stock and the share of company stock in 401(k) participants' accounts has diminished since 1999, some participants' accounts continue to be invested heavily in stock of their employer. In 2007, nearly 8 percent of participants in plans that offered company stock as an investment had more than 80 percent of their account balances invested in company stock, according to EBRI/ICI research.¹¹ Participants heavily invested in employer stock face the double risk of losing both their jobs and a significant portion of their retirement savings, based on the health of a single company. We urge the Department to consider a safe harbor providing fiduciary protection to employers that want to move these participants into a more diversified investment option. The safe harbor should allow participants to opt out of an

automatic diversification program, so that employees who affirmatively decide that significant investment in company stock is appropriate for them could continue to hold that investment.

Finally, we recommend against significant changes to the Department's QDIA regulation. This rule not only eliminated great uncertainty for employers, but also is helping to ensure that defaulted participants are appropriately invested for the long-term in a diversified vehicle containing a mix of asset classes, including both equity and fixed income exposure.¹² In light of the current economic crisis, some have criticized the rule for not allowing certain capital preservation vehicles to qualify as long-term investment defaults. We believe that the Department was correct, and effectuated Congressional intent, in requiring that a QDIA contain a diversified mix of asset classes designed to provide for long-term appreciation and capital preservation. The Department should not reverse course based on the experience of one highly unusual period in the market. It is very important to note, in this regard, that the current QDIA regulation does not foreclose the use of conservatively invested long-term QDIAs – there is ample room within the QDIA requirements to select a conservative default investment.

Disclosure and Marketing by Target Date Funds

Target date funds represent one of the most important innovations in retirement investing. These funds are designed to invest in a mix of asset classes for the duration of a working career and into retirement for a person expecting to retire around a particular date. They rebalance and change their asset allocation to become more conservative over time. Target date funds fix the most common investment errors by providing professionally designed asset allocation models that rebalance and adjust the asset allocation mix as a person nears and enters retirement.¹³ Target date funds help participants who may not otherwise choose to diversify their accounts or use asset allocation tools that plans make available to them, or who may not choose to periodically rebalance the asset allocation in their accounts over time.

The use of target date funds has grown steadily in recent years, in part because these funds can qualify as default investments under the Department's QDIA rule. At year-end 2007, over two-thirds of 401(k) plans in the EBRI/ICI database included target date funds in their investment line-up, and in plans that offer target date funds, 37 percent of participants had at least some portion of their accounts in the funds.¹⁴ Although widely available and widely used, only about 7 percent of total assets in 401(k) plans were in target date funds at the end of 2007.¹⁵ Target date fund investors tend to be younger and shorter-tenured: 44 percent of participants under age 30 had assets in a target-date fund, compared with 27 percent of those ages 60 or older.¹⁶

Target date funds have come under recent scrutiny. Because the percentage of equity held in funds targeted to the same retirement date varies among providers, some have called for standardization

of target date fund asset allocations or increased regulation of target date fund disclosures and advertising.

We strongly believe that regulators should not seek to standardize target date fund asset allocations and glide paths. The differences in glide paths reflect different assumptions, and it is impossible for regulators, or anyone, to determine that one glide path or approach is the “right” one. While all glide paths provide for more exposure to equities for younger investors and for more exposure to fixed income for investors nearing retirement age, glide paths vary between different providers based on different assumptions. For example, the point at which the asset allocation reaches its most conservative asset mix varies. For some target date funds, the end point is at or shortly after the target date, while for others the glide path may continue for 10 to 20 years or more past the target date. These differences reflect different approaches on how to balance the preservation of assets at retirement with the generation of income to address longevity. What is important is that the target date fund explains its approach and its glide path in its disclosure documents.

The use of target date funds is regulated by ERISA and the securities laws (or other federal or state laws in the case of non-registered funds). The new PPA rules that facilitate auto-enrollment did not change ERISA’s strict fiduciary rules for selecting and monitoring plan investment options. Target date funds offered by mutual fund companies are regulated by the SEC like any other mutual funds, and their advisers are required to act as fiduciaries to the fund and its shareholders.¹⁷ These target date funds explain their asset allocation approaches and glide paths in their SEC mandated disclosure documents and notify investors of any material changes. Any fund advertising materials intended for or likely to be used by investors are reviewed by the Financial Industry Regulatory Authority (FINRA) and must comply with SEC and FINRA requirements designed to assure these materials are not misleading. Because target date funds typically operate as funds of funds, they also must meet additional, strict requirements under the Investment Company Act of 1940 with respect to these structures. It is a misperception that the PPA stripped participants who invest in target date funds of ERISA’s fiduciary protection or that target date funds, their disclosures and advertising are not regulated.

We believe it is an appropriate time, nevertheless, to review target date fund disclosures and ~~marketing to determine how understanding of target date funds can be enhanced.~~ To this end, the Institute established a working group, consisting of a broad range of Institute members, that identified key information that target date fund disclosure should cover. These disclosure principles, a copy of which is attached, include sample language to illustrate how each point of information might be conveyed.

Initiatives to Expand Financial Literacy and Provide Advice

The economic crisis provides an opportunity to strengthen the focus of plan participants on the importance of a commitment to savings, smarter investing, and a long-term outlook. We need to redouble our efforts to provide financial and investor education to all Americans at every level, elementary school through adulthood. Plan sponsors and service providers have long supported investment education for participants. This is a task also for educators and national and local government.

The Department plays a crucial role in this area and should continue its efforts to encourage initiatives to expand financial literacy. The Department provides various participant and sponsor education materials, including its “A Look at 401(k) Fees” and other useful publications to help participants get the most out of their 401(k) plans.¹⁸ The Department should continue to promote investment education, and continue to partner with stakeholders. We encourage the Department to explore using new media, such as *YouTube*, to assist American workers in understanding their plans and saving and investing.

We also urge the Department to work with the SEC to facilitate the ability for plans that wish to do so to deliver information to non-English speaking plan participants. For example, 401(k) plan participants receive disclosures under both ERISA (e.g., the summary plan description) and securities laws (e.g., a mutual fund prospectus), and both the Department and the SEC have rules on providing information in languages other than English, but these rules are not coordinated and may need to be modernized.

The Department also may want to lead efforts to provide information to participants making decisions on how to manage their assets in retirement. Much of the material on the Department’s website is geared to the accumulation phase. EBSA should develop educational materials to help participants with distribution decisions at retirement and make these materials prominent and accessible. The Department also should extend Interpretive Bulletin 96-1 to make clear that sponsors and service providers may convey the general advantages and disadvantages of various forms of distribution options without triggering fiduciary liability. Because there is no one-size-fits-all solution to the spend down phase, it is important that participants understand the objectives of the various distribution options available and how those options might meet their needs, appreciate the limitations and risks of each option, and understand product fees and expenses.

Investment Advice Programs

The Department also should facilitate the provision of investment advice in plans. There is no dispute that participants need access to investment advice, even if there is some dispute about the means of encouraging new advice programs. In enacting the PPA, Congress wanted to expand opportunities for participants to receive advice from the plan service providers with which they are familiar, provided the service providers assumed fiduciary responsibilities and met the other detailed conditions enacted in the PPA. As we stated in our comment letter,¹⁹ we believe that the Department's final investment advice rules implemented Congress' intent and resolved ambiguities in PPA's statutory language. We understand there may be a desire to revisit the final rules. If so, at a minimum, we urge the Department not to reverse pre-PPA guidance that allows various forms of advice and education programs.²⁰ This guidance is being used by plans to offer advice programs in many 401(k) plans today.

Expanding Coverage

We are pleased that the Obama Administration has made a priority of expanding coverage in workplace retirement savings arrangements. The Institute fully supports increasing access to payroll-deduction savings, which, when combined with automatic enrollment, will have a significant impact on Americans' retirement readiness. We understand the Department is working with the Treasury Department and others within the Administration to determine how best to achieve this goal. We believe a major focus of this effort should be to explore ways to encourage more employers to voluntarily sponsor plans, including 401(k) plans and SIMPLE IRAs. For example, one way to make SIMPLE plans more attractive would be to allow a two-tiered contribution system, in which employer contributions are optional. Employee deferral limits would be lower for plans without an employer contribution and higher for those with an employer contribution. This would encourage a natural progression from very simple IRA-based plans to true plans with more employer involvement and ERISA protections. We encourage the Department, along with Treasury, to consider improvements that would promote plan sponsorship and graduation to more sophisticated arrangements when the employer is ready.

We are aware of the Administration's ongoing work on an Automatic IRA proposal to cover those currently without workplace plans. If an Automatic IRA is implemented, we strongly believe that ~~no new government bureaucracy is necessary to administer the program or provide investment~~ management. Instead, if a government backstop is desired, we have suggested using a type of savings bond commonly referred to as an R-Bond, or Retirement Bond, to fill this role. R-Bonds would be a more efficient and cost-effective way for the government to ensure adequate options for Automatic IRA participants. We have had conversations with Treasury Department officials about the R-Bond concept and would be happy to discuss it with you at your convenience.

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The Institute and its members look forward to working with the Department in developing appropriate and effective regulatory policies in all these areas. We would be pleased to provide additional information on these issues or to discuss any of these matters with you or Department staff.

NOTES

¹ See Joint Letter of the Investment Company Institute, American Benefits Council, American Council of Life Insurers, Committee on Investment of Employee Benefit Assets, The ERISA Industry Committee, American Bankers Association, Profit Sharing/401k Council of America, Securities Industry and Financial Markets Association, National Association of Manufacturers, U.S. Chamber of Commerce, The Financial Services Roundtable, and Society for Human Resource Management (July 24, 2007), available at http://www.ici.org/policy/regulation/disclosure/07_dol_401k_joint_com.

² See Securities and Exchange Commission, Final Rule, Shareholder Reports and Quarterly Portfolio Disclosure of Registered Management Investment Companies, 69 Fed. Reg. 11244 (March 9, 2004). In its adopting release, the SEC cited Institute research surveying 39 mutual fund complexes with total net assets of \$4.8 trillion (approximately 77 percent of total industry net assets as of June 2000). The research concluded that the aggregate costs to survey respondents associated with calculating and disclosing individualized fund expenses would be \$200.4 million in initial implementation and \$65 million in annual, ongoing costs. This estimate covered only the costs for calculation and disclosure to retail investors. Providing this type of disclosure in 401(k) plans would be even more costly because a plan sponsor or recordkeeper must consolidate fee and account information with respect to each investment in a participant's account, information that derives from different sources. Current recordkeeping systems are not designed to receive the needed information from mutual fund companies and other financial product providers on a daily basis.

³ A large recordkeeper indicated to us that while it has email addresses on file for 82 percent of plan participants, only 3 percent of participants have given affirmative consent to website-only delivery of benefit statements.

⁴ A large recordkeeper estimates that the average cost of providing a benefit statement by mail is around \$2.87 per year per participant.

⁵ See Holden, VanDerhei, Alonso, and Copeland, *401(k) Plan Asset Allocation, Account Balances, and Loan Activity in 2007*, ICI Perspective, vol. 14, no. 3, and EBRI Issue Brief, Investment Company Institute and Employee Benefit Research Institute (Dec. 2008), available at <http://www.ici.org/pdf/per14-03.pdf>. The EBRI/ICI data include data on target date funds offered by mutual funds, collective investment trusts and others. The EBRI/ICI database is the largest, most representative repository of information about individual 401(k) plan participant accounts. As of December 31, 2007, the EBRI/ICI database included statistical information about: 21.8 million 401(k) participants, in 56,232 employer-sponsored 401(k) plans, holding \$1.425 trillion in assets.

⁶ See Nielsen On-Line, *Industry Vertical News on Internet Penetration* (May 2008), available at http://www.nielsen-netratings.com/resources.jsp?section=btn_filter&nav=5.

⁷ These numbers are generally consistent with ICI research on Internet usage. In 2008, more than nine in ten households that own mutual funds report Internet access (see ICI, *2009 Investment Company Fact Book, 49th Edition*, available at <http://www.icifactbook.org/>). Among households owning mutual funds headed by individuals 65 or older, 67 percent report Internet access in 2008 (see ICI *Fact Book*, fig. 6.10).

⁸ See *Executive Brief, The State of Technology and Funding in U.S. Public Libraries in 2007*, at *5, available at <http://ala.org/ala/aboutala/offices/ors/plftas/executivebrief.pdf>.

⁹ See Holden, Bogdan, and Bass, *Ownership of Mutual Funds, Shareholder Sentiment, and Use of the Internet, 2008*, ICI Fundamentals, vol. 17, no. 6 (fig. 24 and 25) (Dec. 2008), available at <http://www.ici.org/pdf/fm-v17n6.pdf>.

¹⁰ See Nessmith, Utkus, and Young, *Measuring the Effectiveness of Automatic Enrollment*, Vanguard Center for Retirement Research, v. 31 (Dec. 2007) (indicating that automatic enrollment improves participation rates, particularly among low-income and younger employees.); Choi, Laibson, Madrian, and Metrick, *Saving For Retirement on the Path of Least Resistance*, originally prepared for Tax Policy and the Economy 2001 (updated draft: July 19, 2004); Choi, Laibson, Madrian, and Metrick, *For Better or For Worse: Default Effects and 401(k) Savings Behavior*, Pension Research Council Working Paper 2002-2 (2002); and Madrian and Shea, *The Power of Suggestion: Inertia in 401(k) Participation and Savings Behavior*, *The Quarterly Journal of Economics*, vol. CXVI, issue 4, pp. 1149–1187 (Nov. 2001).

¹¹ See Holden, VanDerhei, Alonso, and Copeland, *supra* note 5 (fig. 30).

¹² Research shows that higher contribution rates and default investments with equity exposure make a positive difference in generating adequate retirement savings. See Holden and VanDerhei, *The Influence of Automatic Enrollment, Catch-Up, and IRA Contributions on 401(k) Accumulations at Retirement*, *ICI Perspective*, vol. 11, no. 2 and EBRI Issue Brief, No. 283, Investment Company Institute and Employee Benefit Research Institute (July 2005), available at <http://www.ici.org/pdf/per11-02.pdf>. Although tangible data on the impact of the QDIA rule on default investment selection is not yet available, we know that the availability of one-stop investment options is growing—about a third of plans offered target date funds in 2007, up from about 25% in 2005. See Profit Sharing/401k Council of America, *51st Annual Survey Reflecting 2007 Plan Experience* (2008).

¹³ There is evidence that target date funds eliminate extremes in asset allocation. A recent EBRI research paper observed that target date funds – regardless of the funds’ characteristics – move participants’ asset allocations away from “all-or nothing allocations in equities” and provide for more appropriate rebalancing, when compared with 401(k) participants’ own decision making. Copeland, *Use of Target-Date Funds in 401(k) Plans, 2007*, EBRI Issue Brief, No. 327 (March 2009), available at http://www.ebri.org/pdf/briefspdf/EBRI_IB_3-2009_TrgtDtFnds.pdf. The EBRI paper concluded that target date fund participants have a theoretically superior long-term asset allocation of taking larger risks when they are younger and lower risks as the participant gets closer to retirement.

¹⁴ See Holden, VanDerhei, Alonso, and Copeland, *supra* note 5.

¹⁵ See *id.*

¹⁶ See Copeland, *supra* note 13.

¹⁷ Some target date funds are collective investment trusts, not subject to the SEC regulation, or may be offered through an insurance company’s separate account.

¹⁸ See <http://www.dol.gov/ebsa/investing.html>.

¹⁹ See Investment Company Institute letter to Department of Labor re: Investment Advice Final Rule (March 6, 2009), available at <http://www.dol.gov/ebsa/pdf/cmt-03090907.pdf>.

²⁰ See Interpretive Bulletin 96-1, 29 C.F.R. § 2509.96-1; DOL Adv. Op. 97-15A (May 22, 1997) (Frost Bank); DOL Adv. Op. 2005-10A (May 11, 2005) (COUNTRY Bank); DOL Adv. Op. 2001-09A (Dec. 14, 2001) (SunAmerica). See also Prohibited Transaction Exemptions 75-1, 77-4, 84-24, and 86-126.