TESTIMONY OF

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ON BEHALF OF

THE ERISA INDUSTRY COMMITTEE

PROFIT SHARING/401K COUNCIL OF AMERICA

NATIONAL ASSOCIATION OF MANUFACTURERS

AND

U.S. CHAMBER OF COMMERCE

BEFORE THE

U.S. HOUSE OF REPRESENTATIVES

COMMITTEE ON WAYS AND MEANS

IN THE HEARING ON

THE APPROPRIATENESS OF RETIREMENT PLAN FEES

TUESDAY, OCTOBER 30, 2007

Chairman Rangel, Ranking Member McCrery, and Members of the Committee, thank you for the opportunity to submit the views of The ERISA Industry Committee (ERIC), the Profit Sharing/401k Council of America (PSCA), the National Association of Manufacturers (NAM), and the U.S. Chamber of Commerce (the Chamber) on the issue of 401(k) plan fee disclosure.

ERIC is a nonprofit association committed to the advancement of America's major employer's retirement, health, incentive, and compensation plans. ERIC's members' plans are the benchmarks against which industry, third-party providers, consultants, and policy makers measure the design and effectiveness of other plans. These plans affect millions of Americans and the American economy. ERIC has a strong interest in protecting its members' ability to provide the best employee benefit, incentive, and compensation plans in the most cost effective manor.

Established in 1947, PSCA is a national, non-profit association of 1,200 companies and their 6 million plan participants. PSCA represents its members' interests to federal policymakers and offers practical, cost-effective assistance with profit sharing and 401(k) plan design, administration, investment, compliance and communication. PSCA's services are tailored to meet the needs of both large and small companies. Members range in size from Fortune 100 firms to small, entrepreneurial businesses.

The NAM is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. The vast majority of NAM members provide 401(k) plans for their employees and thus have a significant interest in this legislation.

The Chamber is the world's largest business federation, representing more than three million businesses and organizations of every size, sector, and region. The Chamber represents a wide management spectrum by type of business and location. Each major classification of American business -- manufacturing, retailing, services, construction, wholesaling, and finance – is represented. Also, the Chamber has substantial membership in all 50 states, as well as 105 American Chambers of Commerce abroad. Positions on national issues are developed by a cross-section of Chamber members serving on committees, subcommittees, and task forces. More than 1,000 business people participate in this process.

ERIC, PSCA, NAM, and the Chamber appreciate and commend the Committee on its recognition of the importance of fee disclosure. This is a complex and important topic that affects the millions of Americans who participate in 401(k) and other defined contribution retirement plans. Let me begin, by making three key points:

1. Major employers strongly urge the Congress to defer legislative action until after the Department of Labor completes its current fee disclosure projects and the results of those efforts can be evaluated.

2. Major employers support efficient and effective fee disclosure and take their responsibilities for ensuring the reasonableness of plan fees seriously. Our efforts

have resulted in widespread access to the financial markets at fees typically lower than otherwise available.

3. Major employers are concerned that missteps on fee disclosure could inadvertently damage the defined contribution retirement system and threaten the retirement security of millions of workers.

Reform is Underway

It is important that the Committee is fully aware that a regulatory process for fee disclosure is under way, initial regulations are expected within the next few weeks and legislation is neither necessary nor would it be helpful to resolve the issues affecting disclosure to employers and to plan participants. The Department of Labor (DOL) has already begun work on a series of comprehensive regulations to govern 401(k) plan fee disclosure. ERIC, PSCA, and other stakeholders, including those representing plan participants, have been actively engaged in this process and continue to work closely with the DOL to ensure that any new disclosure requirements strike an appropriate balance between the often-competing goals of efficiency and effectiveness.

The DOL has indicated that it will soon release the final modifications to the Form 5500 and accompanying Schedule C, on which sponsors report fees paid to plan service providers. The new form will increase the number of service providers included and create new requirements to report service provider revenue sharing arrangements.

In the next few months, DOL is expected to issue a proposed regulation under ERISA Section 408(b)(2). This section requires that plans pay no more than reasonable compensation to plan service providers. The proposal is expected to ensure that plan fiduciaries have access to the information about all forms and sources of compensation that service providers receive. Both sponsors and providers will be subject to new requirements under these proposed rules, including an anticipated requirement that all third party compensation be disclosed in contracts or other service provider agreements with the plan sponsor.

The final DOL fee initiative is expected to provide extensive new guidance on what and how plan sponsors should disclose information to plan participants. To that end, the DOL issued a request for information (RFI) in April 2007 requesting comment from all stakeholders on the current state of fee disclosure, existing disclosure requirements and practices, and possible new disclosure rules. In response to the RFI, nearly 100 organizations and individuals representing a wide cross section of all concerned submitted detailed comments to DOL. The Department has stated that it will propose in early 2008 new participant disclosure rules governing all participant-directed individual accounts.

We strongly urge Congress to defer legislative action until after DOL completes these regulatory projects. DOL's projects are well underway and are the result of substantial input from stakeholders that represent various viewpoints on this important topic. New legislative requirements at this point would likely result in a substantial delay before enhanced disclosure would become available for plan sponsors and participants.

In addition, the flexibility inherent in the regulatory process makes it a more appropriate avenue for adopting new disclosure requirements. Legislation that adds rigid fee disclosure requirements to ERISA would lock in disclosure requirements and inhibit the ability of plan sponsors and service providers alike to create new investment options and administrative techniques that improve retirement security. Moreover, when these barriers arise, removing them may prove problematic, as legislation is often difficult to change for reasons unrelated to the merits of the proposals being considered.

For these reason, We are concerned that adding new statutory fee disclosure requirements would unnecessarily slow the evolution of 401(k) plans, which have enhanced the benefits provided to participants in recent years through new innovations such as target-date and lifecycle funds, and managed accounts. Because the regulatory process is more flexible and regulations can be more easily changed and updated to reflect new investment options, strategies, and products, we believe that a regulatory solution will be far more beneficial to plan participants in the long term.

Major Employers Support Effective and Efficient Fee Disclosure

Employers strongly support effective and efficient fee disclosure. ERIC, PSCA, NAM, the Chamber, and eight other organizations worked together to respond to the DOL's April RFI and put forward a comprehensive set of principles that should be embodied in any new fee disclosure requirements. Those principles include:

- **Sponsors and Participants' Information Needs Are Markedly Different.** Any new disclosure regime must recognize that plan sponsors (employers) and plan participants (employees) have markedly different disclosure needs.

- **Overloading Participants with Unduly Detailed Information Can Be Counterproductive**. Overly detailed and voluminous information may impair rather than enhance a participant's decision-making.

- **New Disclosure Requirements Will Carry Costs for Participants and So Must Be Fully Justified.** Participants will likely bear the costs of any new disclosure requirements so such new requirements must be justified in terms of providing a material benefit to plan participants' participation and investment decisions.

- **New Disclosure Requirements Should Not Require the Disclosure of Component Costs That Are Costly to Determine, Largely Arbitrary, and Provide Little Meaningful Information.** We believe that the requirement to "unbundled" bundled services and provide individual costs in many detailed categories is not particularly helpful and would lead to information that is not meaningful. It also raises significant concerns as to how a service provider would disclose component costs for services that are not offered outside a bundled contract. Any such unbundling would be subject to a great deal of arbitrariness. These costs will ultimately be passed on to plan participants through higher administrative fees.

- **Information About Fees Must Be Provided Along with Other Information Participants Need to Make Sound Investment Decisions.** Participants need to know about fees and other costs associated with investing in the plan, but not in isolation. Fee information should appear in context with other key facts that participants should consider in making sound investment decisions. These facts include each plan investment option's historical performance, relative risks, investment objectives, and the identity of its adviser or manager.

- **Disclosure Should Facilitate Comparison But Sponsors Need Flexibility Regarding Format**. Disclosure should facilitate comparison among investment options, although employers should retain flexibility as to the appropriate format for workers.

- **Participants Should Receive Information at Enrollment and Have Ongoing Access Annually.** Participants should receive fee and other key investment option information at enrollment and be notified annually where they can find or how they can request updated information.

We strongly urge that the requirements of any new legislation be measured against these basic principles.

Current Law Places Limits on Plan Fees

With all of the discussion surrounding the need for new disclosure requirements, it is important to remember that employers and plan fiduciaries already play an important role in controlling fees paid by 401(k) plan participants.

The Employee Retirement Income Security Act of 1974 (ERISA) already places requirements on plan administrators and provides significant safeguards for employee assets. ERISA requires that plan assets be held in a trust separate from employer assets. ERISA requires that the trust assets be held for the exclusive purpose of providing benefits to participants and their beneficiaries, and ERISA requires that only reasonable expenses for administering the plan may be paid from plan assets.

Thus, the existing structure of ERISA already places a requirement upon plan fiduciaries to ensure that plan fees are reasonable. Major employers take this responsibility seriously.

We believe that a new set of rigid rules that govern fiduciary process will ultimately lead to less appropriate decisions being made. In meeting their duty to ensure that fees are reasonable, plan fiduciaries take into account the unique needs of the participants in their plan. Thus, prudent fiduciary judgments regarding fees and service providers that are made by plan fiduciaries for one plan may be very different that the decisions that make sense for another plan with participant that have different needs.

Moreover, in considering the range of services and fees that make sense for their plan, prudent fiduciaries may come to different conclusions about the right products and service providers. Employers with more a more financially sophisticated workforce may choose a largely self-directed program with numerous investment options, while employers with employees more apt to leave their investment unattended might select a program that focuses more heavily on life-cycle funds, managed accounts, or other less participant-directed options. The cost of providing these programs might differ significantly, but as long as the fees paid are reasonable for the services provided, plan sponsors should have the flexibility to create 401(k) plans that work for their workforces.

Employers might also use different methods for ensuring that plan fees are reasonable. Different plan sponsors will choose different processes based on the needs of their plans. There are numerous methods that plan sponsors might choose to evaluate the fees paid by their plan. It is important that plan sponsors be allowed to fulfill their fiduciary obligation to ensure plan fees are reasonable in the manner most appropriate for their plan, unencumbered by rigid statutory processes. A non-exhaustive list of potential methods plans might choose include:

- The use of a competitive bidding process such as a formal request for proposal process to compare the fees charged by various service providers at the time they enter into a contract;

- Reevaluating the fees paid by their plan regularly to ensure that the fees paid by there are reasonable in light of changes in their plans characteristics;

- They may also engage in internal reviews or hire benchmarking companies and outside consultants to evaluate the level of fees paid by their plans for services and to ensure that they are objectively reasonable; and

- Large employers may leverage their plan’s size and other assets to bargain for lower fees than would otherwise be available.

401(k) Participants Have Benefited from Current Practices

While some have charged plan sponsors with allowing hidden fees to eat into worker’s retirements, the reality is that the current system has generally been good for 401(k) participants with regard to fees. Plan participants typically have access to the market at lower costs than retail investors, while participants in major employer plans typically experience the lowest fees.

CEM Benchmarking Inc. studied 88 US defined contribution plans ranging from $4 million to over $10 billion in plan assets with 8.3 million participants (ranging from fewer than 1,000 to over 100,000 per plan) found that total costs ranged from 6 to 154 basis points (bps) or 0.06 to 1.54 percent of plan assets in 2005. Plans with assets in excess of $10 billion averaged 28 bps while plans between $0.5 billion and $2.0 billion averaged 52 bps.

The Committee on the Investment of Employee Benefit Assets (CEIBA), whose more than 115 members manage $1.4 trillion in defined benefit and defined contribution plan assets on behalf of 16 million (defined benefit and defined contribution) plan participants and beneficiaries, found in a 2005 survey of members that plan costs paid by defined contribution plan participants averaged 22 basis points or 0.22 percent.

Potential Missteps Could Harm the 401(k) System

If the Committee chooses to proceed with new fee disclosure legislation, and we urge that you do not at this time, we caution the Committee to ensure that it does not inadvertently harm the participants it aims to protect. We would urge that the Committee consider the principles outlined in our testimony as the basis for any new disclosure requirements. The failure to do so could result in increased fees for plan participants, increased litigation against plan sponsors, and, ultimately, less generous and fewer 401(k) plans for participants.

We are extremely concerned about the misuse of fee disclosure requirements as the basis for litigation fishing expeditions. To date, more than a dozen lawsuits have been filed against employers—many of them against ERIC members—alleging vague claims of fiduciary breach related to plan fee disclosure. Many of these lawsuits were filed by one firm using the same or very similar language demonstrating a lack of any real evidence of wrongdoing. These suits are often “strike-suits” seeking some form of pre-trial financial resolution without regard to the actual presence of wrongdoing.

These often-groundless allegations do great damage to the 401(k) system. Employers who have already been sued are spending hundred of thousands or millions of dollars defending themselves against claims which in many cases have no basis in reality. Employers who have not been sued—worried that they may be next—are engaged in comprehensive and costly reviews of their 401(k) plans that go well beyond the statutory requirements to help protect themselves from suit. Thus, the twin threats of lawsuits and overreaching legislation have become reasons for some employers to reconsider whether they should continue to provide any form of retirement plan. Some of those employers are former sponsors of defined benefit plans who, because of similar reasons, have retreated from the defined benefit universe.

These additional costs have a very real and negative impact on plan participants. Faced with higher legal costs surrounding their plans, large employers may choose to reduce the size of their employer contributions or curtail them altogether. Smaller plans—and even some larger ones—may choose to discontinue their plans rather than face the increased threat of litigation. The fear of litigation may also result in increased disclosure for disclosure’s sake that provides participants with little useful information, but greatly increases the administrative costs paid by plan participants.

Similarly, the cost of any new disclosure requirements must be justified by their benefits. Many of the disclosure requirements currently introduced in the House would create a complex and burdensome disclosure regime. Such disclosure would dramatically increase the administrative costs paid by plan participants while overwhelming them with information that is of little practical value as they make the decision to participate in the 401(k) plan and the decision of which investment option to select.

Conclusion

We strongly believe that the regulatory process is the appropriate place to address the concerns that have been raised about 401(k) plan fees and disclosure. We encourage the Committee to allow DOL to continue its work on fee disclosure, evaluate the results, and then determine if new legislation is needed.

We believe that a disclosure regime that provides participants and plan sponsors with the information they need to make their respective decisions about plan fees is achievable. It is critical that such a system not overwhelm participants with voluminous, granular information that does not aid the decision making process.

It would be a tragic irony if an attempt to improve the ability of plan participants to make good investment decisions ultimately led to higher costs and lower participation in the retirement system.