

GAO

Report to the Chairman, Committee on  
Education and Labor, House of  
Representatives

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July 2008

# PRIVATE PENSIONS

## Fulfilling Fiduciary Obligations Can Present Challenges for 401(k) Plan Sponsors





Highlights of [GAO-08-774](#), a report to the Chairman, Committee on Education and Labor, House of Representatives

## Why GAO Did This Study

American workers increasingly rely on 401(k) plans for their retirement security, and sponsors of 401(k) plans—typically employers—have critical obligations under the Employee Retirement Income Security Act of 1974 (ERISA). When acting as fiduciaries, they must act prudently and solely in the interest of plan participants and beneficiaries. The Department of Labor (Labor) is responsible for protecting private pension plan participants and beneficiaries by enforcing ERISA. GAO examined: (1) common 401(k) plan features, which typically have important fiduciary implications, and factors affecting these decisions; (2) challenges sponsors face in fulfilling their fiduciary obligations when overseeing plan operations; and (3) actions Labor takes to ensure that sponsors fulfill their fiduciary obligations, and the progress Labor has made on its regulatory initiatives. To address these objectives, GAO administered a survey asking sponsors how they select plan features and oversee operations, reviewed industry research, conducted interviews, and reviewed related documents.

## What GAO Recommends

GAO is not making any additional recommendations in this report, but GAO has previously suggested that Congress consider changes to ERISA addressing fiduciary roles.

To view the full product, including the scope and methodology, click on [GAO-08-774](#). To view the survey results, click on [GAO-08-870SP](#). For more information, contact Barbara Bovbjerg at (202) 512-7215 or [bovbjergb@gao.gov](mailto:bovbjergb@gao.gov).

## PRIVATE PENSIONS

### Fulfilling Fiduciary Obligations Can Present Challenges for 401(k) Plan Sponsors

#### What GAO Found

Plan sponsors commonly select certain noninvestment and investment features, and their decisions about which investment features to select generally have important fiduciary implications. According to industry research, most 401(k) plans offer a number of common features, such as employer contributions and loans for employees. Some of these decisions seldom involve fiduciary obligations set by ERISA because they are mainly business decisions related to establishing the plan. However, a sponsor's decisions about investment features, like the menu of investment options, entail important fiduciary obligations under ERISA. ERISA and its regulations stipulate certain requirements for these investment decisions, like offering diversified funds and prudently selecting and monitoring investment options. Various other factors also affect a sponsor's menu decisions, including the size of the plan and the role of external advisers and other providers.

Plan sponsors face challenges in fulfilling their obligations when fiduciary roles are not clearly defined or when sponsors lack important information about arrangements between service providers. Fiduciary roles that are not clearly defined can lead to gaps in plan oversight. For example, several industry professionals noted situations when sponsors assumed they had delegated fiduciary investment advice for the selection and monitoring of investment funds to a service provider, but the service provider did not acknowledge that fiduciary role. Sponsors also have fiduciary obligations when selecting and monitoring one or more service providers. To fulfill these obligations, Labor's guidance indicates that sponsors should obtain information about service providers' compensation arrangements and potential conflicts of interest that could affect the service provider's performance. Labor and various industry practitioners have proposed new ways to improve fiduciary oversight that may address some of the challenges of unclear fiduciary roles and providers' arrangements.

Labor takes various actions to monitor sponsors' fiduciary oversight of 401(k) plans and has made some progress on its regulatory initiatives. Labor's actions include investigating reports of questionable 401(k) plan practices, collecting information from plan sponsors, and conducting outreach to educate plan sponsors about their responsibilities. Labor is also proceeding with several initiatives to improve disclosures to participants, plan sponsors, government agencies and the public. For example, Labor recently published a proposed rule on the information that service providers must disclose to plan sponsors but is trying to resolve several questions before issuing a final rule. In addition, certain matters that GAO has asked Congress to consider would help Labor in its efforts to improve sponsors' fiduciary oversight. We previously suggested that Congress amend ERISA to (1) explicitly require 401(k) service providers to disclose to plan sponsors the compensation they receive from other service providers and (2) give Labor authority to recover plan losses against certain types of service providers even if they are not currently considered fiduciaries under ERISA.

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# Contents

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<b>Letter</b>		1
	Results in Brief	3
	Background	5
	Sponsors Determine a Number of Common Plan Features, and Their Decisions about Investment Features Have Important Fiduciary Implications	12
	Plan Sponsors Can Face Challenges in Fulfilling Their Fiduciary Obligations When Business Arrangements Are Unclear or Undisclosed	20
	Labor Monitors Sponsors' Operation of 401(k) Plans and Has Made Progress on Recent Regulatory Initiatives	26
	Concluding Observations	33
	Agency Comments and Our Evaluation	34
<b>Appendix I</b>	<b>Scope and Methodology</b>	36
<b>Appendix II</b>	<b>GAO Contact and Staff Acknowledgments</b>	40
<b>Tables</b>		
	Table 1: Investment Funds Available for Participant Contributions, Expressed as a Percentage of Respondents	15
	Table 2: Summary of Labor's Disclosure Initiatives	30
<b>Figures</b>		
	Figure 1: Services That 401(k) Plan Sponsors May Hire Various Outside Companies to Provide	10
	Figure 2: Flow of Bundled and Unbundled Plan Services	11
	Figure 3: Differences in Fiduciary Role and Possible Fee and Service Arrangements Using an Investment Adviser versus a Broker	22

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## Abbreviations

CAP	Consultant/Adviser Project
EBSA	Employee Benefits Security Administration
ERISA	Employee Retirement Income Security Act of 1974
IPS	investment policy statement
Labor	Department of Labor
OPA	Office of Participant Assistance
<i>Plansponsor</i>	<i>Plansponsor Magazine</i>
PSCA	Profit Sharing/401(k) Council of America
RFI	request for information
RIA	Registered Investment Adviser
VFCP	Voluntary Fiduciary Correction Program

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United States Government Accountability Office  
Washington, DC 20548

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July 16, 2008

The Honorable George Miller  
Chairman  
Committee on Education and Labor  
House of Representatives

Dear Mr. Chairman:

Over the past two decades, American workers have become increasingly reliant on 401(k) plans for their retirement security. These employer-sponsored pension plans typically allow workers to divert a portion of their pretax income, often with employer contributions, into an investment account that can grow tax free until withdrawn in retirement. According to the Department of Labor (Labor), in 2005, there were about 436,000 401(k) plans that held about \$2.4 trillion in assets for the retirement savings of more than 54 million plan participants—more than any other type of employer-sponsored pension plan in the United States. To administer these plans, the sponsor—typically the employer offering the 401(k) plan—selects plan features and other characteristics, including the types of investment options offered to participants, and monitors the performance of one or more service providers, such as investment advisers and record keepers. The Employee Retirement Income Security Act of 1974 (ERISA) imposes significant fiduciary obligations on plan sponsors and other plan fiduciaries, requiring them to act prudently and in the interests of the plan’s participants and beneficiaries.<sup>1</sup> Labor is responsible for ensuring that plan sponsors and other plan fiduciaries fulfill these obligations.

In two recent reports, we asked Congress to consider amending ERISA to expand Labor’s statutory authority over plan service providers and help

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<sup>1</sup>Under ERISA, a fiduciary is anyone, such as a sponsor, trustee, investment adviser, or other service provider, to the extent they exercise any discretionary authority or control over plan management or any authority or control over the management or disposition of plan assets, render investment advice respecting plan money or property for a fee or other compensation, or have discretionary authority or responsibility for plan administration. 29 U.S.C. § 1002(21)(a).

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ensure that sponsors are properly overseeing plan services.<sup>2</sup> While Congress continues to consider new legislation, Labor has also tried to address some of these underlying issues through regulatory initiatives. As Congress considers changes to the law that governs how these plans are designed, managed, and overseen, GAO was asked to identify the following:

- common 401(k) plan features, those that typically have important fiduciary implications, and what factors affect these decisions;
- challenges sponsors face in fulfilling their fiduciary obligations when overseeing plan operations; and
- actions Labor takes to ensure that sponsors fulfill their fiduciary obligations, and the progress Labor has made on its regulatory initiatives.

To determine common plan features and which decisions typically have fiduciary implications and related factors, and the challenges sponsors face in fulfilling their fiduciary obligations, we collected and analyzed the results of published industry research. We also collected information on sponsor practices from a range of plan sponsors, service providers, industry associations, and other industry professionals—including fiduciary advisers—through interviews and reviews of documents, such as materials on fiduciary obligations given by service providers to sponsors. In addition, we administered a survey in coordination with *Plansponsor Magazine* (*Plansponsor*) asking sponsors how they select plan features and oversee plan operations. The survey and a more complete tabulation of the results can be viewed at [GAO-08-870SP](#). The survey respondents were members of *Plansponsor*'s subscription list, and their responses cannot be considered representative of the overall population of 401(k) plan sponsors. We received a total of 448 completed survey responses after distributing the survey to a population of about 22,000. Because of the methodological limitations of this survey, information from this survey is anecdotal and represents only the views of the 448 survey respondents. To determine the actions that Labor takes to ensure that sponsors fulfill their fiduciary obligations, we interviewed Labor officials and reviewed

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<sup>2</sup>GAO, *Private Pensions: Changes Needed to Provide 401(k) Plan Participants and the Department of Labor Better Information on Fees*, [GAO-07-21](#) (Washington, D.C.: Nov. 16, 2006) and GAO, *Defined Benefit Plans: Conflicts of Interest Involving High Risk or Terminated Plans Pose Enforcement Challenges*, [GAO-07-703](#) (Washington, D.C.: June 28, 2007).

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Labor's legal and regulatory authority and its procedures for assuring that plans are meeting the overall requirements. See appendix I for more details regarding our scope and methodology. We conducted our review from January 2007 through June 2008 in accordance with generally accepted government auditing standards.

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## Results in Brief

Plan sponsors determine a number of common noninvestment plan features, but they also make decisions about investment features with important fiduciary implications. Industry research indicates that most 401(k) plans offer a number of common features, including an employer contribution, a loan program, eligibility of employees, and vesting of benefits. Some selections are primarily business decisions, similar to whether or not to establish the plan, that seldom involve fiduciary obligations. About one-half of sponsors responding to our survey said that a committee of the sponsor and about one-half said that employer management was the primary decision maker on various noninvestment features, but this information cannot be considered representative of all 401(k) plan sponsors.<sup>3</sup> However, when a sponsor makes decisions about investment features—like selecting the menu of investment options—it acts as a fiduciary and is subject to fiduciary obligations under ERISA, including the duties to act prudently and solely in the interest of participants and beneficiaries. In our survey, most responding sponsors said that a committee of the sponsor was the primary decision maker for areas like the investment menu or investment goals. While sponsors that act as a fiduciary for investment functions must satisfy their fiduciary obligations, they have considerable latitude in selecting investment options, such as the number and types of options. Besides ERISA and its regulations, various other factors affect a sponsor's decision regarding the selection of the investment menu, including the size of the plan and the role of external advisers and providers. For example, many sponsors responding to our survey used a third-party investment adviser.

Plan sponsors face challenges in fulfilling their obligations when fiduciary roles are not clearly defined or when sponsors lack important information about arrangements between service providers. Sponsors often hire

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<sup>3</sup>Respondents to the survey as a whole exclude sponsors who are not part of *Plansponsor's* subscription list and recipients of the survey who chose not to complete it. These other sponsors may differ from our respondents, such as their knowledge and practices about deciding plan features or monitoring operations. Thus, the results of our survey may not represent and cannot be generalized to the population of all 401(k) sponsors.

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outside professionals to manage some or all of a 401(k) plan's day-to-day operations. Some of these service providers provide investment advice for a fee, or exercise sufficient control or discretion over the plan or its assets, thereby becoming fiduciaries under ERISA. However, fiduciary roles that are not clearly defined between the sponsor and other plan fiduciaries can lead to gaps in plan oversight. For example, several industry professionals noted situations when sponsors assumed they had delegated fiduciary investment advice for the selection and monitoring of investment funds to a service provider, but the service provider did not acknowledge that fiduciary role. Sponsors also have fiduciary obligations when they select and monitor one or multiple service providers. To fulfill these obligations, Labor's guidance indicates that sponsors should obtain information about service providers' compensation arrangements and potential conflicts of interest that could affect the service provider's performance. To improve fiduciary oversight in these areas, Labor has proposed a rule to require pension plan service contracts to disclose additional information, including the extent to which service providers will become fiduciaries for the functions they will perform.<sup>4</sup> If finalized, compliance with this rule could eliminate some of the confusion surrounding the sharing of fiduciary duties between sponsors and their service providers and help sponsors provide better oversight of plan services.

Labor takes various actions to monitor sponsors' fiduciary oversight of 401(k) plans and has made some progress on its regulatory initiatives. Labor investigates reports of questionable 401(k) plan practices, collects information from plan sponsors, and conducts outreach to educate plan sponsors about their responsibilities. Labor is also pursuing several regulatory initiatives to improve disclosures provided to participants, plan sponsors and fiduciaries, government agencies and the public. Labor has recently issued proposed regulations to specify the information that service providers must disclose to plan sponsors. However, Labor is in the process of resolving several questions before it can issue final regulations, such as the extent to which providers within a bundled arrangement—a package of plan services—would be bound by the disclosure requirements of the regulations. Some of the matters that GAO has asked Congress to consider, if addressed, would also help Labor in its efforts to improve sponsors' fiduciary oversight. For example, we previously suggested that Congress amend ERISA to explicitly require 401(k) service providers to disclose to plan sponsors the compensation they receive from other

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<sup>4</sup>72 Fed. Reg. 70,988 (Dec. 13, 2007).

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service providers.<sup>5</sup> Furthermore, we found that undisclosed business arrangements or conflicts of interest may have resulted in financial harm to some plans.<sup>6</sup> Given this risk, we asked that Congress consider amending ERISA to give Labor greater authority to recover plan losses against certain types of service providers even if they are not currently considered fiduciaries under ERISA. These changes would provide Labor with greater statutory authority over plan service providers and help ensure that sponsors are properly overseeing plan services.

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## Background

Roughly half of all workers participate in an employer-sponsored retirement, or pension, plan. Private sector pension plans are classified as either defined benefit or defined contribution plans. Defined benefit plans promise to provide, generally, a fixed level of monthly retirement income that is based on salary, years of service, and age at retirement, regardless of how the plan's investments perform. In contrast, benefits from defined contribution plans are based on the contributions to and the performance of the investments in individual accounts, which may fluctuate in value. These accounts are tax-advantaged in that contributions are typically excluded from current income, and earnings on balances grow tax-deferred until they are withdrawn.<sup>7</sup> One type of defined contribution, or individual account, plan is the 401(k) plan.

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## Fiduciary Obligations under ERISA

In accordance with ERISA and related Labor regulations and guidance, plan sponsors and other fiduciaries must exercise an appropriate level of care and diligence given the scope of the plan and act for the exclusive benefit of plan participants and beneficiaries, rather than for their own or another party's gain. Responsibilities of fiduciaries include:

- selecting and monitoring any service providers to the plan;

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<sup>5</sup>[GAO-07-21](#).

<sup>6</sup>[GAO-07-703](#).

<sup>7</sup>Beginning in 2006, plans were permitted to allow employees to designate some or all of their elective contributions to Roth 401(k) plans, which are not excluded from current income but allow for tax-free withdrawals after 5 years of participation and if certain other conditions related to age, death or disability have been met. Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, § 617, 115 Stat. 38, 103-06 (codified at 26 U.S.C. § 402A). According to the industry research that we reviewed, 18 percent or fewer of sponsors of 401(k) plans also offered a Roth 401(k) opportunity.

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- reporting plan information to the government and to participants;
  - adhering to the plan documents, including any investment policy statement;
  - identifying parties-in-interest to the plan and taking steps to monitor transactions with them;
  - selecting and monitoring investment options the plan will offer and diversifying plan investments; and
  - ensuring that the services provided to their plan are necessary and that the cost of those services is reasonable.

ERISA allows plan sponsors to hire companies that will provide services necessary to operate their 401(k) plan if certain conditions are met. In general, ERISA prohibits parties-in-interest—such as service providers, plan fiduciaries, the employer, the union, owners, officers, and relatives of parties-in-interest—from doing business with the plan, but provides various exemptions to these prohibited transactions.<sup>8</sup> Some of the exemptions provide for dealings with banks, insurance companies, and other financial institutions essential to the ongoing operations of the plan. The Internal Revenue Code sets forth parallel prohibited transaction provisions with respect to “disqualified persons,” such as service providers, and provides a parallel conditional exemption for the provision of services. The exemption requires that: (1) the contract or arrangement must be reasonable, (2) the services must be necessary to operate the plan, and (3) the compensation can not exceed what is reasonable for the services provided.<sup>9</sup> Some other prohibited transactions relate solely to fiduciaries using plan assets in their own interest or acting on both sides of a transaction involving a plan. Fiduciaries cannot receive money or any other consideration for their personal account from any party doing business with the plan related to that business.

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<sup>8</sup>29 U.S.C. § 1106. Prohibited transactions under ERISA included a sale, exchange, or lease between the plan and party-in-interest; lending money or other extension of credit between the plan and party-in-interest; and furnishing goods, services, or facilities between the plan and party-in-interest. Labor may grant, by regulation, exemptions to certain prohibited transactions.

<sup>9</sup>26 U.S.C. § 4975(c) and (d)(2). The Internal Revenue Code imposes a significant tax on disqualified persons involved in such prohibited transactions unless they fit within this or various other exemptions. 26 U.S.C. § 4975(a), (b) and (d).

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In the course of providing services, a service provider may become a fiduciary by reason of providing investment advice for a fee, or exercising sufficient control over, or discretion with respect to, the administration or assets of the plan.<sup>10</sup> For example, holding plan assets in trust to assure that they are used solely to benefit the participants and their beneficiaries would make the trustee a fiduciary. An outside professional that provides advice for a fee to plan sponsors about the selection of funds to be included in the menu of options made available to participants would also be a fiduciary. Providers of many other necessary services—such as keeping the record of participants’ individual accounts and providing the investment funds being made available to plan participants—are typically not fiduciaries.

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## The Department of Labor’s Role

Labor’s Employee Benefits Security Administration (EBSA) is the primary agency responsible for protecting private pension plan participants and beneficiaries from the misuse or theft of their pension assets by enforcing ERISA, which defines and sets certain standards for employee benefit plans sponsored by private sector employers. EBSA oversees 401(k) plans because they are considered employee benefit plans under ERISA. Enacted before the 401(k) provision was added to the Internal Revenue Code, ERISA establishes the responsibilities of employee benefit plan decision makers.

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 Labor’s Office of the Inspector General, the Pension Benefit Guaranty Corporation, the Internal Revenue Service, the Department of Justice (including the Federal Bureau of Investigation), the Securities and Exchange Commission, the federal banking agencies, state insurance commissioners, and state attorneys general.

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<sup>10</sup>A person is deemed to be providing investment advice only if such person (1) provides advice as to the value of, or makes recommendations as to the advisability of investing in, purchasing or selling, securities or other property, and (2) has direct or indirect discretionary authority or control over the purchase or sell of securities or other property for the plan, or regularly provides advice as to the value of securities or other property, pursuant to a mutual agreement, arrangement, or understanding, that will serve as a primary basis for plan investment decisions and is based on the particular needs of the plan. 29 C.F.R. § 2510.3-21(c) (2007).

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In addition to its investigations, Benefits Advisors in the field and in EBSA's Office of Participant Assistance (OPA), help workers get the information they need to protect their benefit rights and obtain benefits that have been improperly denied. In fiscal year 2007, Benefits Advisors recovered over \$96 million on behalf of participants and beneficiaries through informal resolution of participant complaints. Benefits Advisors also refer cases for investigation. There were 611 enforcement cases closed in fiscal year 2007 whose original source was a Benefit Advisor referral. Of these, 451 were 401(k) plan investigations, including 389 that were closed with monetary results of over \$46 million.<sup>11</sup>

EBSA's policy is to resolve 401(k) participant complaints involving late or unremitted employee contributions at the earliest possible opportunity. Benefits Advisors are provided with guidance on how to handle these 401(k) contribution-related complaints. While Benefits Advisors do not have investigative authority and cannot make formal demands on employers or plan sponsors, they are authorized to request that the employer, plan sponsor, or other appropriate third-party official provide documents or information related to a participant's complaint on an individual or plan-wide basis. EBSA's Benefits Advisors may also attempt to resolve the complaints and correct any violations on a plan-wide basis through informal dispute resolution. If the complaint involves unremitted or untimely employee contributions, Benefits Advisors can request information from the plan sponsor and, after review, advise the plan on the amount of contributions due. In fiscal year 2007, \$5.8 million in pension benefits were restored to plans by Benefits Advisors as a result of this procedure.

EBSA also has regional initiatives focused on fiduciary oversight. Several of them have produced results related to 401(k) fiduciary issues. Even with an initiative focused on settlor fees,<sup>12</sup> one regional office still obtained

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<sup>11</sup>Benefits Advisors also provided assistance to 62,000 inquirers with questions about their pension plans. In fiscal year 2007, fiduciary related pension issues were discussed 5,980 times with participants and 1,612 times with employers and other plan officials. Topics discussed included administrative charges, bankruptcy, employee contributions, fund investments, abandoned plans, and prohibited transactions.

<sup>12</sup>Labor has taken the position that there is a class of activities which relates to the formation, rather than the management, of plans. These activities, generally referred to as settlor functions, include decisions relating to the formation, design, and termination of plans and, with few exceptions, are generally not activities subject to Title I of ERISA. Expenses incurred in connection with settlor functions would not be reasonable expenses of a plan.

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results related to fiduciary issues under the project. According to an EBSA official, 401(k) plans have obtained monetary results related to fiduciary issues in three cases under the project, totaling more than \$8 million.<sup>13</sup>

Labor's ERISA Advisory Council, created by ERISA to provide advice to the U.S. Secretary of Labor, is another resource for Labor. For example, in 2007, this council formed the Working Group on Fiduciary Responsibilities and Revenue Sharing Practices to study numerous issues regarding fiduciary responsibilities arising from the enactment of the Pension Protection Act of 2006<sup>14</sup> and to address issues relative to the practice of revenue sharing, a now-common practice used to offset plan expenses with respect to defined contribution 401(k) plans. The working group's report concluded that there is a role for Labor to take the lead in formally defining 401(k) terms, such as "revenue sharing," and that Labor should compile appropriate terminology in connection with that definition. According to the report, the provision of concise definitions would be a considerable step in reducing the confusion about the flows of revenues, fees, and costs, and could only benefit the plan sponsors, fiduciaries, and service providers in fulfilling their role to participants.

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## Plan Services

Plan sponsors of 401(k) plans often hire various outside companies to provide a number of services necessary to operate a 401(k) plan. As shown in figure 1, these services can

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<sup>13</sup>In two cases the plan fiduciaries selected the plan sponsor to provide administrative services to its employee benefit plans. As a result, the sponsor was reimbursed for more than direct and indirect expenses. In the third case, the plan fiduciaries used plan assets to settle a legal claim made by former plan participants who alleged the sponsor failed to make timely distributions of their accounts upon termination of employment.

<sup>14</sup>Pub. L. No. 109-280, 120 Stat. 780.

**Figure 1: Services That 401(k) Plan Sponsors May Hire Various Outside Companies to Provide**

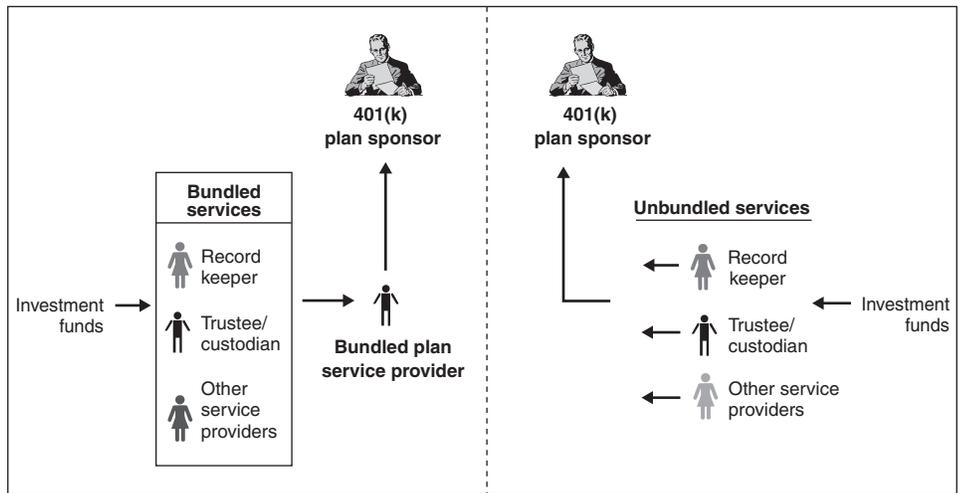


Sources: GAO and Art Explosion (clip art).

include investment management (e.g., selecting and managing the securities included in a bank collective trust fund); consulting and providing financial advice (e.g., selecting vendors for investment options or other services); record keeping (e.g., tracking individual account contributions); custodial or trustee services for plan assets (e.g., holding the plan assets in a bank); and telephone or Web-based customer services for participants.

The delivery structure for providing plan services can vary. Generally, there are two structures: “bundled” (the sponsor hires one company that provides the full range of services directly or through subcontracts) and “unbundled” (the sponsor uses a combination of service providers), as shown in Figure 2.

**Figure 2: Flow of Bundled and Unbundled Plan Services**



Sources: GAO analysis of information from industry practitioners and Art Explosion (clip art).

Note: This figure depicts a simplified example of one possible arrangement and is not intended to depict all arrangements.

In a bundled arrangement, a sponsor might delegate the oversight for the selection and monitoring of plan services, except for the selection and monitoring of the bundled provider itself. In contrast, in an unbundled arrangement, the sponsor might retain oversight of the selection and monitoring for some or all other service providers.

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## Sponsors Determine a Number of Common Plan Features, and Their Decisions about Investment Features Have Important Fiduciary Implications

Although, when determining a number of common, noninvestment features and other plan characteristics, plan sponsors are frequently acting as settlors,<sup>15</sup> their decisions about investment features have important fiduciary implications. Industry research finds that most 401(k) plans offer a number of common noninvestment features such as employer contributions and loan programs. For example, industry research shows that at least 94 percent of sponsors offered some type of employer contribution.<sup>16</sup> Like whether or not to establish a plan, these determinations are primarily business decisions that seldom involve fiduciary duties. However, when a sponsor makes decisions about investment features—like selecting the menu of investment options—it acts as a fiduciary and is subject to fiduciary obligations under ERISA. While sponsors must act prudently and solely in the interest of participants and beneficiaries when acting as a fiduciary for investment functions, they have considerable latitude in selecting fund options, such as the number and types of options. Besides ERISA and its regulations, various other factors affect a sponsor when it makes investment decisions regarding the selection of the investment menu, including the size of the plan and the role of external advisers and providers.

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## Plan Sponsors Determine Some Common Plan Features to Establish the Plan

Some common plan features and other characteristics include an employer contribution, a loan program, eligibility of employees, and vesting of benefits. While an employer contribution and a loan program are optional, a 401(k) plan is required to have eligibility and vesting rules.

- An employer contribution can take different forms, such as a matching contribution and/or nonmatching contribution made regardless of participant contributions. In industry research we reviewed, at least 94 percent of sponsors indicated that they offer some type of employer

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<sup>15</sup>Plan sponsors are often characterized as wearing two hats under ERISA: As the creator of a plan and the trust to fund it, they are referred to as settlors. As the entity responsible for the administration of a plan and management of its trust, depending on the function performed, they often fall within the definition of a fiduciary under ERISA. Only in the latter capacity are plan sponsors obligated to make decisions solely in the interest of plan participants and beneficiaries. *Lockheed Corp. v. Spink*, 517 U.S. 882, 890-91 (1996).

<sup>16</sup>The 50th Annual Survey of Profit Sharing and 401(k) Plans for 2006 by the Profit-Sharing/401(k) Council of America (PSCA), Trends and Experience in 401(k) Plans 2007 by Hewitt Associates, and the Annual 401(k) Benchmarking Survey 2005/2006 edition by Deloitte Consulting.

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contribution, while 6 percent or fewer do not offer such contributions.<sup>17</sup> Research by the Bureau of Labor Statistics and industry groups shows the different methods to determine any employer contribution, such as formulas based on participant contributions, years of service, company profits, or other means.<sup>18</sup>

- A loan program enables participants to take one or more loans from the contributions in their account. In industry research we reviewed, at least 84 percent of sponsors include a loan program.<sup>19</sup>
- Eligibility of employees refers to the requirements for employees to become eligible to participate in the plan, such as an age or service requirement. Sponsors can choose less restrictive requirements for eligibility than required by law. For example, in industry research GAO reviewed, about half of respondents to industry research offer immediate eligibility with no age or service requirements.<sup>20</sup>
- Vesting of benefits refers to the length of time before a plan participant has a nonforfeitable right to an accrued benefit. For 401(k) plans, participant contributions are required to be vested immediately, but employer contributions may be vested over time according to plan terms. As with employee eligibility, the law sets the maximum amounts of time before an employee is vested, but sponsors can decide on less restrictive vesting provisions. For example, in industry research GAO reviewed, about 40 percent of respondents have immediate vesting in employer matching contributions.<sup>21</sup>

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<sup>17</sup>We drew on the following industry research: the 50th Annual Survey of Profit Sharing and 401(k) Plans for 2006 by the Profit-Sharing/401(k) Council of America (PSCA), Trends and Experience in 401(k) Plans 2007 by Hewitt Associates, and the Annual 401(k) Benchmarking Survey 2005/2006 edition by Deloitte Consulting. While a new Deloitte survey is to be issued soon, it was not available at the time of our review. Where possible, we compared their results for convergence. For more information, see appendix I.

<sup>18</sup>See, for example, Keenan Dworak-Fisher, "Employer Generosity in Employer-Matched 401(k) Plans, 2002-03," Bureau of Labor Statistics *Monthly Labor Review* (Washington, D.C., July/August 2007).

<sup>19</sup>The 50th Annual Survey of Profit Sharing and 401(k) Plans, Trends and Experience in 401(k) Plans 2007, and the Annual 401(k) Benchmarking Survey 2005/2006 edition.

<sup>20</sup>Trends and Experience in 401(k) Plans 2007 and the Annual 401(k) Benchmarking Survey 2005/2006 edition.

<sup>21</sup>The 50th Annual Survey of Profit Sharing and 401(k) Plans, Trends and Experience in 401(k) Plans 2007, and the Annual 401(k) Benchmarking Survey 2005/2006 edition.

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When making decisions about some noninvestment plan features, sponsors act as settlors rather than fiduciaries. According to our survey, 186 of 441 sponsors said the sponsor's committee was the primary decision maker for various noninvestment, settlor decisions, while 205 sponsors said that company management was.<sup>22</sup> Sponsors make many settlor function decisions, such as those related to establishing, amending, or terminating a plan. They are considered business decisions and include the decision to offer a particular type of plan, the levels of benefits to provide, and the termination of the plan. The fiduciary obligations under ERISA, including the overarching duties to act prudently and solely in participants' interest, are seldom involved in many of these decisions.<sup>23</sup>

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### Sponsors' Decisions about Investment Features Have Important Fiduciary Implications

When making decisions about investment features, ERISA's fiduciary duties apply. As a result, when plan sponsors acting as a fiduciary for investment functions make such decisions, they must offer prudent, diversified choices for participants to fulfill the duties of acting prudently and diversifying plan investments. Several pension professionals told us, in fact, that the main plan feature with important fiduciary implications is the investment menu.<sup>24</sup> When developing that menu, sponsors must act for the sole benefit of participants and beneficiaries, rather than that of their own or another party. According to our survey, 349 of 440 responding sponsors said that the sponsor committee or management was the primary decision maker for selecting the menu of investment options. Industry research

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<sup>22</sup>Our respondents represent a nonrandom sample of sponsors from the subscription list of an industry publication. While 448 sponsors completed our survey, the number of sponsors answering particular questions varies. Survey responses represent the views of the 448 respondents to our survey and cannot be generalized to the population of 401(k) plan sponsors. See appendix I for more information about our survey methodology.

<sup>23</sup>However, once sponsors make these settlor decisions, then the fiduciary obligations may apply when implementing these decisions.

<sup>24</sup>Sponsors may include other features with fiduciary implications, such as providing employer stock as a fund option or offering investment advice to participants. These features have their own distinct considerations, such as the undiversified nature of employer stock or differences between education versus advice for plan participants. Industry research indicates that about half of responding 401(k) sponsors or less offered these features. Also, areas of plan operations other than investments, such as administration or communication with participants, may have fiduciary implications. For example, the sponsor must ensure the timely deposit of employee contributions to comply with ERISA and related Labor regulations.

shows that the median number of options was in the range of 11 to 15, with as many as 24 percent of responding plans offering 20 or more funds.<sup>25</sup>

When acting as fiduciaries for investment functions, sponsors have considerable latitude in selecting fund options, including the number and types of funds, from which participants choose. Table 1 shows funds available for participant contributions, according to research from one industry group. These funds involve different categories of investments.

**Table 1: Investment Funds Available for Participant Contributions, Expressed as a Percentage of Respondents**

Fund type	Plan size, by number of participants					All plans
	1-49	50-199	200-999	1,000-4,999	5,000+	
Balanced stock/bond fund	52.0	62.8	66.1	75.3	65.0	64.8
Bond-actively managed, domestic	50.0	62.0	58.8	69.8	60.2	60.5
Bond-indexed, domestic	25.3	30.2	26.1	28.0	43.9	30.0
Cash equivalents (CD/money market)	53.3	48.8	41.8	39.6	48.8	45.9
Company stock	4.7	0.8	10.3	28.6	56.9	19.6
Equity-actively managed, domestic	70.7	78.3	76.4	87.4	79.7	78.8
Equity-actively managed, international	62.0	76.7	74.5	85.2	79.7	75.8
Equity-indexed, domestic	53.3	69.8	72.1	78.0	87.0	71.8
Equity-indexed, international	18.7	14.0	19.4	14.3	35.8	19.8
Real estate fund	29.3	25.6	15.8	14.8	10.6	19.1
Other sector fund	12.7	11.6	10.9	7.7	4.1	9.5
Self-directed (brokerage window) <sup>a</sup>	12.0	9.3	12.1	14.8	20.3	13.6
Self-directed (mutual fund window) <sup>a</sup>	8.0	5.4	4.8	3.8	6.5	5.6
Stable value fund	34.0	55.8	58.8	69.2	68.3	57.4
Target retirement date	22.0	24.8	37.0	41.8	39.0	33.4
Other lifestyle fund(s)	20.7	24.8	25.5	22.0	26.0	23.6
Other	18.0	11.6	10.3	9.3	11.4	12.0

Source: Profit Sharing/401(k) Council of America.

<sup>a</sup>A self-directed window allows participants to invest in individual stocks or mutual funds.

ERISA's fiduciary obligations require that fees paid by the plan are reasonable and that services provided to the plan are necessary. Thus,

<sup>25</sup>The 50th Annual Survey of Profit Sharing and 401(k) Plans, Trends and Experience in 401(k) Plans 2007, and the Annual 401(k) Benchmarking Survey 2005/2006 edition.

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sponsors must consider the fees and other characteristics of the funds, including potential returns and risk. For example, index funds are passively managed funds with lower management fees than actively managed funds, for which the investment provider pursues particular investments in an attempt to obtain higher than average returns. Similarly, sponsors must prudently select the service providers to the plan, such as the providers of record keeping services and service providers that make investment options available to the plan. In our survey, the primary decision maker for selecting service providers for investment options was the sponsor committee for 283 of 445 respondents and sponsor management for 108 respondents. For selecting providers of record keeping, the primary decision maker was the sponsor committee for 256 of 445 respondents and sponsor management for 135 respondents. As with selecting funds, fees are one of many issues—such as providers’ qualifications and quality of services—to consider when selecting providers.

ERISA’s fiduciary duties also apply to a sponsor including a default option for participants not making an investment choice. These duties include prudently selecting and monitoring the option based on an objective, thorough, and analytical process that involves careful consideration of the quality of competing providers and investment products, as appropriate. A recent Labor regulation provides certain fiduciary relief when participants’ contributions are invested in qualified default investment alternatives that include lifecycle funds, balanced funds, or managed accounts.<sup>26</sup> Labor decided on these alternatives, which combine stocks and fixed income securities like bonds, based on considerations that included diversification and adequacy of savings for retirement. Thus, if participants do not provide instructions on how to invest their contributions, sponsors may place contributions into a default investment. For example, participants may not provide investment instructions when automatically enrolled in a plan by their sponsor.

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<sup>26</sup>72 Fed. Reg. 60,452 (Oct. 24, 2007). According to the regulation, lifecycle, or target-date, funds combine different funds and automatically rebalance asset allocations toward more conservative investments as the participant nears retirement. Balanced funds are pooled accounts for different risk levels. Managed accounts resemble lifecycle funds but differ by the potential funds composing the portfolio and how they are provided. Besides these three alternatives, the regulation included grandfathered and short-term principal preservation funds.

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Once the investment menu is selected, sponsors must monitor the fund options as part of their fiduciary obligations. Several pension professionals noted that monitoring funds may involve quantitative criteria that include investment returns as compared to benchmarks, risk, and fees, along with qualitative criteria such as the stability of the provider. In our survey, 362 of 448 sponsors said they benchmark the investment performance of the 401(k) plan.<sup>27</sup> Of those who do benchmarking, 297 respondents said they benchmark each option to the performance of a peer group as one way of monitoring performance. As part of this monitoring of fund options, efforts of sponsors may include reviewing reports about the performance of the funds, holding meetings, placing poorly performing funds on a watch list, ultimately removing funds or replacing them with better options, and documenting their decisions. Some pension professionals told us that investment monitoring efforts generally were of good quality overall but that certain fund characteristics, such as risk, or particular plan sizes, such as some small plans, were not always monitored adequately.

Some pension professionals are concerned that sponsors may rely on the investment provider or record keeper to monitor the funds. For example, one fiduciary adviser noted that research by an industry group showed that the provider may conduct investment monitoring for as many as 38 percent of respondents. According to this fiduciary adviser, if a sponsor relies on the provider for fund monitoring and lacks an independent adviser, an objective analysis of the funds may not occur, which could result in a prohibited transaction under certain circumstances. According to our survey, the entity primarily responsible for monitoring the performance of the plan investments as compared to investment goals or policy was frequently the plan sponsor committee (214 of 443 respondents) or an external investment/financial adviser (107 respondents).

Sponsors may also set investment goals and policies for the 401(k) plan. Before selecting funds for the menu, sponsors may set investment goals and policies that affect which particular categories of funds it can include in the menu. Many pension professionals noted that such planning by the sponsor should take into account the needs of its workforce, such as its

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<sup>27</sup>Our survey provides anecdotal information that represents the views of the 448 respondents and cannot be generalized to the population of 401(k) plan sponsors. See appendix I for more information about our survey methodology.

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age profile or level of knowledge about investments.<sup>28</sup> This planning may be documented in a written investment policy statement (IPS), which 339 of 440 sponsors responding to our survey have. An IPS is a document that can guide future decisions by documenting the intended goals and performance of the plan, as well as the guidelines for selecting, monitoring, and altering investments.<sup>29</sup> According to our survey, 208 of 339 respondents said the sponsor's committee was the primary decision maker for establishing a written IPS. Despite the advantages of an IPS, the policy statement may present difficulties for certain sponsors, such as greater risks of fiduciary breaches and potential liability if the sponsor does not follow it. Regardless of a plan's goals and policies, Labor's regulation on investment duties specifies factors for sponsors to consider for prudent investment decisions, including diversification, liquidity, return, and risk in relation to the overall portfolio.<sup>30</sup>

The asset size of the plan may affect the investment menu, as sponsors of larger plans generally have greater internal expertise and/or capacity for committees to aid in overseeing the plan, as well as more leverage to negotiate the menu and fees. Of 447 sponsors answering this question in our survey, 396 had one or more plan committees with typically three to seven members, while research by an industry group found 72 percent had committees. For plans with \$200 million or more in assets, 60 of 90 sponsors reported that they have exactly one committee, and 29 reported having more than one committee. However, for some employers, particularly smaller businesses, the owner of the company acts as the fiduciary to decide about the plan investments and providers but may have less time, knowledge, and resources to make those decisions. In addition, larger plans typically have more leverage as they negotiate with providers about fund options and the fees to operate the plan. Several professionals stated that large and sometimes medium-sized sponsors have greater

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<sup>28</sup>For example, some professionals noted that a workforce with limited knowledge of investments may not be well served by a complex plan with dozens of funds, including less diversified funds specializing in particular economic sectors or a self-directed brokerage allowing investment in individual mutual funds or stocks.

<sup>29</sup>An investment policy statement (IPS) has fiduciary implications and can help demonstrate the execution of fiduciary obligations, including following a prudent process and offering diversified funds. Part of an ERISA fiduciary's duty is to follow plan documents, including any IPS. 29 U.S.C. § 1104(a)(1)(D). Labor's regulation on this issue states that a written statement of investment policy is consistent with ERISA's provisions to have a funding policy but does not say that one is required. 29 C.F.R. § 2509.94-2 (2007).

<sup>30</sup>29 C.F.R. § 2550.404a-1 (2007).

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ability to prescribe the investment menu than small sponsors who are more likely to face restricted choices with requirements to include the investment provider's own funds. For example, one adviser noted that plans with over \$100 million in assets can generally offer the funds they want in the menu. Plans with more assets are also better positioned to negotiate lower fees, given the competition among providers to manage sponsors' pension assets.<sup>31</sup>

Furthermore, advisers assisting sponsors may affect decisions about the investment menu. While ERISA allows the hiring of external advisers and other providers, they must be prudently selected and monitored for the quality of their services and conflicts of interest, among other things. Of 445 sponsors responding to this survey question, 308 said they use a third-party investment adviser. According to Labor's guidance, a plan fiduciary should hire and monitor external experts if the sponsor lacks the expertise internally. Several types of advisers are available to assist the sponsor, such as registered investment advisers, consultants, and insurance or securities brokers. However, advisers differ in a number of ways, including by the services they provide, the extent to which they are willing to serve as a fiduciary, how they are compensated, and whether they are affiliated with a larger company like an insurance company or a broker-dealer. As a result, some of these advisers may have incentives not to act solely in the interest of participants, which may shape the investment menu. In our survey, for 170 of 438 sponsors, a sponsor committee monitors plan investment decisions for such potential conflicts of interest, while an external investment/financial adviser does so for 94 of the sponsors.

As with advisers, other service providers—such as the investment provider or the record keeper—may shape the menu of investments in different ways. For example, sponsors or providers can limit the menu largely or entirely to the provider's own proprietary funds, which tend to have greater profit margins or may not always perform as well as funds offered by other investment providers. Also, a number of pension professionals indicated that sponsors may defer to the provider about the menu, and

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<sup>31</sup>In light of the fiduciary obligation to act for the sole benefit of participants and to pay only reasonable fees, plans over a certain size may pursue nonretail investment vehicles, including separate accounts or collective trusts, which typically have lower fees than retail investment vehicles. However, some professionals noted that these vehicles with lower fees may not have listings in financial news for participants or obvious benchmarks for sponsors to monitor fund performance.

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thus about fund performance and fees.<sup>32</sup> However, according to our survey, most sponsors said that the sponsor’s committee was the primary decision maker for the investment goals, menu, and any investment policy statement, with relatively few saying the primary decision maker was the 401(k) provider.

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## Plan Sponsors Can Face Challenges in Fulfilling Their Fiduciary Obligations When Business Arrangements Are Unclear or Undisclosed

Plan sponsors face challenges in fulfilling their obligations when fiduciary roles are not clearly defined or when sponsors lack important information about arrangements between service providers. Fiduciary roles that are not clearly defined between the sponsor and other plan fiduciaries can lead to gaps in plan oversight. Sponsors also have fiduciary obligations when they select and monitor one or multiple service providers. To fulfill these obligations, Labor’s guidance indicates that sponsors should obtain information about service providers’ compensation arrangements and potential conflicts of interest that could affect the service provider’s performance. To improve fiduciary oversight in these areas, Labor has proposed a rule to require pension plan service contracts to disclose additional information, including the extent to which service providers will become fiduciaries for the functions they will perform.<sup>33</sup> If finalized, compliance with this rule could eliminate some of the confusion surrounding the sharing of fiduciary duties between sponsors and their service providers and help sponsors provide better oversight of plan services.

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## A Sponsor’s Failure to Clearly Define Fiduciary Relationships Can Lead to Gaps in Oversight

Plans may have one or multiple plan fiduciaries, but who is and who is not a fiduciary is not always apparent. ERISA requires that at least one fiduciary be named in the plan documents, although others may be identified voluntarily.<sup>34</sup> Depending on how the delivery of plan services is structured, the sponsor may retain, share, or delegate certain fiduciary roles with the advisers or other providers it hires. For example, sponsors may use an officer or company manager, one or more internal committees, or an outside professional—sometimes called a third-party service provider—as a fiduciary to manage some or all of a plan’s day-to-day

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<sup>32</sup>For example, investment providers or record keepers may try to steer sponsors to funds which result in higher hidden fees for themselves or other providers, while sponsors have a fiduciary obligation to pay only reasonable plan expenses.

<sup>33</sup>72 Fed. Reg. 70,988 (Dec. 13, 2007).

<sup>34</sup>29 U.S.C. § 1102(a).

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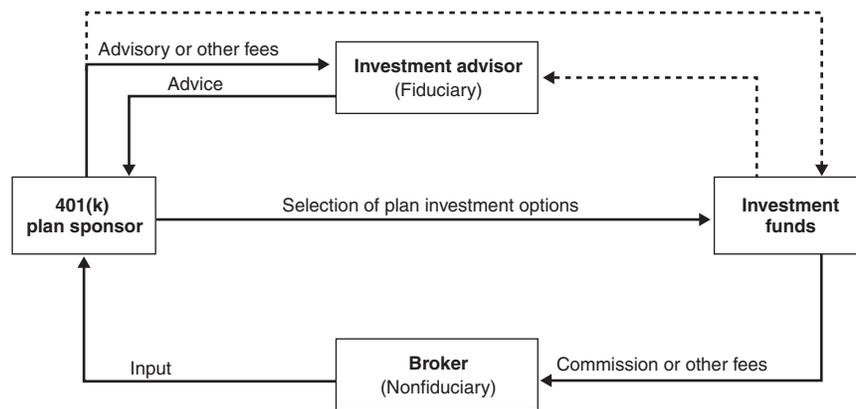
operations. These services can include investment management, consulting and providing financial advice, record keeping, custodial or trustee services for plan assets, and telephone or Web-based customer services for participants. Providers may also assist sponsors to fulfill their fiduciary obligations by educating sponsors or helping them comply with ERISA requirements. For example, one provider we met has informational materials for its clients, including checklists about fiduciary obligations, sample documents, and newsletters on regulatory updates.

While ERISA allows a plan sponsor to hire outside professionals to manage some or all of their plan's day-to-day operations, this does not relieve the sponsor of all fiduciary obligation. The hiring of any service provider is itself a fiduciary act, and under ERISA, a sponsor must act prudently when selecting one or multiple service providers and monitor their performance. To comply with ERISA, the plan sponsor must have sufficient information to make informed decisions about the services, costs and the qualifications of the service providers, and the quality of the services being provided. The sponsor must ensure that expenses paid out of plan assets, including fees paid to service providers, are and continue to be reasonable in light of the level and quality of services provided. The sponsor must also determine whether there are conflicts of interest related to service provider compensation. Conflicts of interest can occur, for example, when a service provider steers a plan sponsor toward offering investment options that benefit the service provider but may not be in the best interest of the plan participants.

Rather than prescribing the specific actions that a sponsor needs to take when selecting and monitoring one or multiple service providers, ERISA requires that a prudent process be followed to ensure that the sponsor's fiduciary obligations are met. According to Labor, prudence requires expertise in a variety of areas, such as investments. Lacking that expertise, a fiduciary will want to hire someone with that professional knowledge to carry out the investment and other functions. Prudence focuses on the process for making fiduciary decisions. For instance, in hiring a plan service provider, a fiduciary may decide to survey a number of potential providers, asking for the same information and providing the same requirements. By so doing, a fiduciary can make a meaningful comparison and selection. According to Labor, however, many of the specific actions that sponsors may take to meet these duties can vary. Labor recommends that sponsors establish and follow a formal review process at reasonable intervals.

Sponsors may assume that they have delegated all their fiduciary duties to an outside professional hired to run the plan, but the sponsor always retains some fiduciary obligation. While plan sponsors may hire various advisers and consultants to provide advice on the selection and monitoring of investment funds, fiduciary duties may be distributed differently depending on the service arrangement. For example, an investment adviser who recommends investment funds to a plan sponsor for a fee, may be a fiduciary under ERISA.<sup>35</sup> In contrast, if the sponsor is selecting funds from a broker and the broker provides no investment advice, the fiduciary obligations may lie entirely with the sponsor under ERISA, as shown in figure 3.

**Figure 3: Differences in Fiduciary Role and Possible Fee and Service Arrangements Using an Investment Adviser versus a Broker**



----- Optional advisory or other fees

Source: GAO analysis of information from industry practitioners.

Sharing or delegating fiduciary duties among service providers can contribute to indistinct fiduciary roles if their respective roles are not well

<sup>35</sup> A person is deemed to be providing investment advice only if such person (1) provides advice as to the value of, or makes recommendations as to the advisability of investing in, purchasing or selling, securities or other property, and (2) has direct or indirect discretionary authority or control over the purchase or sell of securities or other property for the plan, or regularly provides advice as to the value of securities or other property, pursuant to a mutual agreement, arrangement, or understanding, that will serve as a primary basis for plan investment decisions and is based on the particular needs of the plan. 29 C.F.R. § 2510.3-21(c) (2007).

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defined. Some sponsors may be more concerned with hiring a provider to perform a particular service than about determining whether or not the provider will be acting as a plan fiduciary. For example, several industry professionals noted situations when sponsors assumed they had delegated fiduciary investment advice for the selection and monitoring of investment funds to a service provider, but the service provider did not acknowledge that fiduciary role. Several pension practitioners observed that most sponsors, especially sponsors of small plans, have very little fiduciary knowledge. For example, one attorney with an employee benefits firm stated that while sponsors may know they are fiduciaries, without understanding the concept and extra duties of being responsible for plan assets, they primarily see their function as hiring service providers who they may view as the “real” fiduciaries. A number of practitioners have stated that some service providers understand fiduciary roles better than plan sponsors do but may wish to avoid the liability associated with certain fiduciary duties, even though their actions may define them as fiduciaries under the law. This can lead some sponsors to assume that they have delegated certain fiduciary duties to a service provider, although the provider may not acknowledge any fiduciary role. When the service provider is not a fiduciary, it is not bound by the fiduciary duties to act prudently and solely in the plan’s best interest. For example, according to several practitioners, Registered Investment Advisers (RIA) are generally fiduciaries, while some other advisers describe themselves as consultants in an attempt to avoid fiduciary responsibility.

Because ERISA generally does not require that additional fiduciaries be named, determinations may not be made unless a lawsuit is filed claiming that the plan has been harmed. Misunderstanding can also occur because many large providers offer a range of services that a sponsor can choose from, including some that involve fiduciary duties and others that may not.

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### Sponsors Cannot Fulfill Their Fiduciary Obligations without Disclosures about Compensation Arrangements and Potential Conflicts of Interest

Labor’s guidance indicates that to fulfill their fiduciary obligations sponsors should obtain certain information about service providers’ compensation arrangements and potential conflicts of interest. However, some sponsors do not understand their service providers’ revenue sharing arrangements or may be unaware of potential conflicts of interest. Research by one industry group found that about 60 percent of responding sponsors said that providers fully disclosed revenue sharing. According to pension practitioners, sponsors of large plans, helped by advisers or consultants, may have a better understanding of revenue sharing and are negotiating lower fees than in the past, but sponsors of medium-sized plans generally do not understand how undisclosed compensation flows

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between service providers behind the scenes, even if they understand mutual fund expense ratios.

Significant differences in ways that advisers and other providers are compensated may have important implications for the sponsor's oversight, including identifying potential conflicts of interest. According to an RIA that we spoke with, if the adviser is an RIA hired by a plan sponsor on a fee-for-service basis, his allegiance may be different than an adviser who is a broker and receives a commission based on the value of the investment product that is selected. Furthermore, other experts noted that a sponsor may opt for what appears to be a "free" 401(k) plan (with no record keeping fees for the employer) without understanding that the providers' compensation may be passed on to participants by embedding fees in the plan's investment options. "Hidden" fees may also mask the existence of a conflict of interest. Hidden fees are usually related to business arrangements where one service provider to a 401(k) plan pays a third-party provider for services, such as record keeping, but does not disclose this compensation to the plan sponsor. Without disclosing these arrangements, service providers may be steering plan sponsors toward investment products or services that may not be in the best interest of participants. Research by one industry group showed that 36 percent of responding sponsors either did not know the fees being charged to participants or thought no fees were charged at all. An RIA told us that if a "free" 401(k) plan has been selected by the sponsor, it is unlikely that the sponsor used an RIA to examine the underlying fee structure. In a situation like this, one practitioner said that it is more likely that the human resources department, rather than the finance department, selected the free plan option. In addition to failing to understand the fee structure, some less knowledgeable staff may act out of loyalty to their employer without fully understanding ERISA's fiduciary duty to act in the best interests of the plan. Consequently, they may select an arrangement that reduces the employer's fees at the expense of the higher embedded fees paid by participants, which may involve a fiduciary breach under certain circumstances.

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### Various Ways to Improve Fiduciary Oversight Have Been Proposed

Labor officials and various industry practitioners have proposed new ways to improve fiduciary oversight. A regulation recently proposed by Labor could eliminate some of the confusion surrounding fiduciary obligations. In December 2007, Labor proposed a regulation that would require, among other

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things, a service provider of an employee benefit plan, including 401(k) plans, to state whether it will provide services to the plan as a fiduciary.<sup>36</sup> Labor believes that plan fiduciaries, including sponsors and service providers, would benefit from regulatory guidance in this area. According to Labor, the increased complexity of administering services and benefits for these plans has made it more difficult for plan sponsors to understand compensation arrangements between service providers. The proposed regulation would amend the current regulations under ERISA to clarify the meaning of a reasonable contract or arrangement between sponsors (or other fiduciaries) and service providers to include the disclosure of information concerning all compensation to be received by the service providers and any conflicts of interest that may have adverse effects on the cost and quality of plan services. Among the information that would be required under the proposed provision on conflicts of interest, is a requirement to determine whether the entity will provide services to the plan as a fiduciary.

If finalized, compliance with this rule could eliminate some of the confusion surrounding the sharing of fiduciary duties between sponsors and their service providers and help sponsors provide better oversight of plan services. Labor is in the process of analyzing the information from the public comments it received earlier this year and the hearings it held regarding this regulation. Labor officials anticipate issuing a final regulation by the end of this year.

In addition, consulting organizations have suggested other measures to improve accountability for fulfilling fiduciary obligations, such as fiduciary training for plan sponsors and auditing plans for fiduciary compliance.

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<sup>36</sup>On December 13, 2007, Labor published a notice of proposed rulemaking to amend its regulations under section 408(b)(2) of ERISA, 29 C.F.R. § 2550.408b-2, relating to the provision of services to employee benefit plans. 72 Fed. Reg. 70,988.

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## Labor Monitors Sponsors' Operation of 401(k) Plans and Has Made Progress on Recent Regulatory Initiatives

Labor takes various actions to monitor sponsors' fiduciary oversight of 401(k) plans and has made some progress on its regulatory initiatives. Labor investigates reports of questionable 401(k) plan practices, collects information from plan sponsors, and conducts outreach to educate plan sponsors about their responsibilities. Labor is also pursuing several initiatives to improve disclosures provided to participants, plan sponsors and fiduciaries, government agencies and the public. Recently, Labor issued proposed regulations to clarify the information that service providers must disclose to plan sponsors.<sup>37</sup> However, Labor is in the process of resolving several questions before it can issue a clear set of final regulations. In previous reports, we asked Congress to consider certain matters that, if addressed, could provide Labor with greater statutory authority over plan service providers and help ensure that sponsors are properly overseeing plan services.<sup>38</sup>

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## Labor Investigates Fiduciary Breaches and Conducts Outreach to Educate Plan Sponsors

Labor uses a variety of methods to ensure that sponsors fulfill their fiduciary obligations. These include enforcement efforts, such as investigations of employee benefit plans, and outreach efforts to educate plan sponsors about their responsibilities.

EBSA's regional offices seek to detect, correct, and deter violations, such as excessive fees and expenses, and failure by fiduciaries to monitor ongoing fee structure arrangements. EBSA opened 3,746 civil investigations and obtained nearly \$1.3 billion monetary results in fiscal year 2007. Over \$245 million of those monetary results were related to 401(k) investigations. These investigations cited violations, such as failure to act prudently, payment of excessive administrative expenses, and failure to monitor ongoing arrangements.

We reported in 2007 that EBSA does not conduct routine compliance examinations, such as evaluations of a company's books, records, and internal controls. Instead, EBSA uses participant complaints and other agency referrals as sources of investigative leads and to detect potential violations. EBSA also identifies leads through informal targeting efforts by investigators, primarily using data reported by plan sponsors on their Form 5500 annual returns. During our 2007 review, EBSA officials raised

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<sup>37</sup>72 Fed. Reg. 70,988 (Dec. 13, 2007).

<sup>38</sup>[GAO-07-21](#) and [GAO-07-703](#).

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concerns that conducting such examinations would divert resources from EBSA's current enforcement practices.<sup>39</sup>

When EBSA uncovers a fiduciary breach, it can take several actions against the fiduciary. These actions can result in a monetary result for the plan (such as restored plan assets), or an action taken by EBSA that results in the fiduciary or a service provider being enjoined or removed (these commonly include compelling the fiduciary to fulfill its obligations, enjoining the fiduciary from committing a further violation, compelling the fiduciary to make restitution for the violation, removing the fiduciary, and/or disallowing the fiduciary from ever serving in another fiduciary capacity, to name a few).

Labor receives complaints regarding fiduciary breaches in several areas, such as

- fees or expenses charged for plan services. This can include the plan having paid unreasonable/excessive fees or settlor fees.
- situations where the employer has filed for or may file for bankruptcy. This includes alleged mismanagement and/or misuse of plan assets combined with the fact that the employer has filed bankruptcy.
- how long an employer may take to deposit participant contributions into the plan (including participant's loan repayments). This includes inquiries regarding possible fiduciary violations and missing or delinquent contributions. Contributions are delinquent when an employer fails to transmit employee contributions as soon as reasonably possible.<sup>40</sup>
- investment of funds. This includes imprudent investments, those prohibited by the plan document or failure of the plan administrator to offer a diversified menu of investment options in a 401(k) plan.

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<sup>39</sup>GAO, *Employee Benefits Security Administration: Enforcement Improvements Made but Additional Actions Could Further Enhance Pension Plan Oversight*, [GAO-07-22](#) (Washington, D.C.: Jan. 18, 2007).

<sup>40</sup>In no event is "as soon as reasonably possible" later than the 15<sup>th</sup> business day of the month following the month in which the participant contribution amounts are received by the employer (in the case of amounts that a participant or beneficiary pays to an employer) or the 15<sup>th</sup> business day of the month following the month in which such amounts would have been payable to the participant in cash (in the case of amounts withheld by an employer from a participant's wages). 29 C.F.R. § 2510.3-102(b).

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- loans or sales to parties in interest and/or the use of plan assets for personal or company use. This includes prohibited transactions related to self-dealing (a fiduciary acting in its own interest); dual loyalties (representing adverse parties); or receipt of consideration from a third party, also known as kickbacks.

EBSA also focuses some of its 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, is focused on identifying conflicts of interest and the receipt of indirect, undisclosed compensation by pension consultants and other investment advisers. Its investigations 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.<sup>41</sup> According to an EBSA official, the agency has not yet taken enforcement action against consultants or advisers or 401(k) plan fiduciaries. However, the official told us that by implementing this initiative, EBSA has demonstrated its concern about the receipt of indirect, undisclosed compensation by fiduciary consultants and advisers doing business with 401(k) plans. CAP also seeks to identify potential criminal violations, such as kickbacks or fraud.

In addition to its enforcement efforts, EBSA works to educate and assist employers (particularly small employers), auditors and other service providers in understanding and complying with their obligations under the law and related regulations and procedures, including those related to 401(k) plans.<sup>42</sup> EBSA also has a program called the Voluntary Fiduciary Correction Program (VFCP), which allows plan officials to disclose and correct certain violations without penalty. In fiscal year 2007, 1,303 401(k) VFCP applications were received by EBSA's regional offices, and over \$20.7 million was restored to 401(k) plans as a result of this program.

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<sup>41</sup>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.

<sup>42</sup>One example of EBSA's efforts is its Fiduciary Education Campaign. Since the campaign was launched in May 2004, EBSA has conducted 24 seminars attended by 2,720 plan sponsors and practitioners. EBSA also provides a number of tools— such as its interactive ERISA Fiduciary Advisor on EBSA's Web site—as well as tips for employers on selecting and monitoring plan service providers. The ERISA Fiduciary Advisor was launched on October 9, 2007. From the launch date until April 30, 2008, the site was visited by 16,723 unique visitors.

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According to EBSA, virtually all transactions under the VFCP program are related to fiduciary issues.

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### Labor Has Made Some Progress on Relevant Regulatory Initiatives but Legislation Could Also Promote Fiduciary Oversight

Since our November 2006 report, EBSA has made progress on three regulatory initiatives to improve the transparency of fee and expense information to participants, plan sponsors and fiduciaries, government agencies and the public. It began these initiatives, in part, amid concerns that participants were not receiving information in a format useful to them when making investment decisions and that plan fiduciaries were having difficulty getting needed fee and compensation arrangement information from service providers to fully satisfy their fiduciary obligations.

EBSA's regulatory initiatives to expand disclosure requirements cover three distinct areas, (1) disclosures by plan sponsors to participants to assist in making informed 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.<sup>43</sup> At the time of our last review, EBSA had a proposed rule for its initiative on disclosures to the government and the public. Table 2 shows the progress EBSA has made since our November 2006 report.

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<sup>43</sup>The Form 5500 includes information on the plan's sponsor and the number of participants, among other things. The form also provides more specific information, such as plan assets, liabilities, insurance, and financial transactions. Filing this form satisfies the requirement for the plan administrator to file annual reports concerning, among other things, the financial condition and operation of plans. Labor uses this form as a tool to monitor and enforce plan sponsors' responsibilities under ERISA.

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**Table 2: Summary of Labor’s Disclosure Initiatives**

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**Disclosure by plan sponsors to participants**

<b>Information gathering</b> 72 Fed. Reg. 20,457	In April 2007, Labor published a request for information (RFI) to solicit the views, suggestions, and comments from plan participants, plan sponsors, plan service providers, and members of the financial community, as well as the general public, on the extent to which rules should be adopted or modified, or other actions taken, to ensure that participants and beneficiaries have the information they need to make informed decisions about the management of their individual accounts and the investment of their retirement savings. Labor officials have stated that they soon plan to publish a proposed regulation that will govern disclosure by plans to plan participants.
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**Disclosures by service providers to plan sponsors**

<b>Proposed rule</b> 72 Fed. Reg. 70,988	On December 13, 2007, EBSA published a proposed rule to amend its current regulations under section 408(b)(2) of ERISA 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. <sup>a</sup> The regulation would require service providers to disclose, in writing, to plan fiduciaries of 401(k) plans, all services to be furnished; all direct and indirect compensation to be received; and any potential conflict of interest, such as certain third-party relationships, that could affect their objectivity under a service contract or arrangement. 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. Labor believes that such disclosures are critical to ensuring that contracts and arrangements are “reasonable” within the meaning of the statute.
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**Disclosure by plan sponsors to Labor and the public**

<b>Final rule</b> 72 Fed. Reg. 64,710	<p>On November 16, 2007, EBSA published a final rule revising the annual reporting requirements of plans concerning service provider compensation. For the most part, the reporting changes, including the requirement to file forms electronically, go into effect for plan years beginning on or after January 1, 2009. The new regulations expanded Schedule C of the Form 5500 so that, in addition to compensation paid directly by a plan to a service provider, it requires the reporting of “indirect compensation” paid to those who directly or indirectly provide services to the plan.</p> <p>All persons receiving \$5,000 or more of total compensation must be identified on Schedule C. In general, the Schedule requires additional information for any service provider who is a fiduciary or provides contract administrator, consulting, custodial, investment advisory, investment management, broker, or record keeping services. It is expected that existing regulatory disclosures may be used to meet these requirements, e.g., prospectus, SEC Form ADV, if they meet certain requirements. Labor’s intent is to ensure that revenue sharing payments and other forms of indirect compensation, such as float, are reported at least to the plan administrators if not to Labor.<sup>b</sup></p>
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Source: GAO analysis.

<sup>a</sup>Labor’s December 2007, notice of proposed rule making also proposed a class exemption that would provide relief from certain prohibited transaction restrictions of ERISA. The proposed class exemption would relieve the responsible plan fiduciary from any liability for a prohibited transaction that would result from entering into a contract or arrangement for the provision of services when the service provider failed to comply with the proposed regulation.

<sup>b</sup>Float revenue is revenue earned from the short-term investment of plan assets.

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Status of Initiative on Disclosure by Plan Sponsors to Participants

Labor’s request for information (RFI) requested comments on fee and expense disclosure issues affecting participants and beneficiaries of 401(k)-type plans governed by ERISA. Specifically, Labor sought information on what administrative and investment-related fee and expense information participants should consider when investing their retirement savings, the manner in which the information should be furnished to participants, and who should provide that information. The RFI cited our November 2006 report on fees as part of the impetus for issuing the RFI. However, while we did suggest that Congress consider amending ERISA to require all sponsors to disclose fee information to participants in a way that facilitates comparison among the options, our recommendation to the Secretary of Labor was to require plan sponsors to report a summary of all fees that are paid out of plan assets or by participants to Labor. Labor has not yet published a proposed regulation related to the RFI.

Status of Initiative on Disclosures by Service Providers to Plan Sponsors

According to Labor officials, they are in the process of resolving several questions before Labor can issue final regulations, such as the extent to which providers within a bundled arrangement—a package of plan services—would be bound by the disclosure requirements of the regulations. Labor held a hearing on March 31, 2008, to further develop the public record regarding the regulation and the class exemption and to assist the department in understanding the issues involved. Labor heard testimony from a variety of interested parties, including plan service providers, industry and participant associations, plan sponsors, and law firms. According to Labor officials, they are still reviewing the comments and testimony received.

The Assistant Secretary for the Employee Benefits Security Administration told Congress that EBSA will work to ensure that the benefits of the proposed regulation—which may include lower fees, increased efficiencies, and some reduced costs—will outweigh the costs of compliance. According to the Assistant Secretary, plan fiduciaries could be provided an exemption if they enter into contracts that are not “reasonable” because, unbeknownst to them, the service provider failed to comply with its disclosure obligations.<sup>44</sup> Several members of Congress sent a letter to Labor expressing their displeasure over the proposed regulation.

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<sup>44</sup>Statement of Bradford P. Campbell, Assistant Secretary of Labor, Before the Committee on Education and Labor, U.S. House of Representatives, Oct. 4, 2007. Statement of Bradford P. Campbell, Assistant Secretary of Labor, Before the Special Committee on Aging, U.S. Senate, Oct. 24, 2007.

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Among other things, the letter stated that Labor, rather than excusing failures with class exemptions for fiduciaries who fail to receive required disclosures, should update its guidance on fiduciary responsibility and provide model documents and explanations of key terms to pension plan officials.

Several members of Congress have introduced bills that would require various additional disclosures related to individual account plans, including information from service providers.<sup>45</sup> One bill, as introduced, would require service providers to disclose to the plan sponsor all fees that workers will pay, including such things as sales commissions, trading costs, and termination or surrender charges. The bill would require service providers to outline any financial or other conflicts of interest to plan sponsors.

Some sponsors, however, have expressed concern about the introduction of fee disclosure legislation. For example, in our survey, sponsors expressed concern about the amount and manner in which information is disclosed to plan participants. Given the complexity of the information being provided, sponsors felt that disclosures should be simple and easy to understand. In our survey, sponsors also stated that fees should be disclosed in a transparent manner and should be readily identifiable by the plan sponsor and participants. In addition to concerns about fee disclosures, several sponsors suggested that disclosures would work best if standardized and that legislation may help providers be consistent in their data preparation and allow “apples to apples” comparisons of fee information.

While the Assistant Secretary of Labor for the Employee Benefits Security Administration has stated that a statutory amendment is not necessary for the department to complete its work, we continue to believe that a statutory change is necessary to ensure that these matters are fully addressed and that the matters that GAO has recently asked Congress to

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<sup>45</sup>H.R. 3185, the 401(k) Fair Disclosure for Retirement Security Act of 2007, was introduced in Congress on July 26, 2007; H.R. 3765, the Defined Contribution Plan Fee Transparency Act of 2007, was introduced on October 4, 2007; and S. 2473, the Defined Contribution Fee Disclosure Act of 2007, was introduced on December 13, 2007.

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consider, if addressed, would help Labor in its efforts to improve sponsors' fiduciary oversight.<sup>46</sup> For example,

- We previously asked that Congress consider amending ERISA to explicitly require 401(k) service providers to disclose to plan sponsors the compensation they receive from other service providers. This change would provide Labor with explicit statutory authority over plan service providers for this purpose and help sponsors properly oversee plan services.
- In addition, in our 2007 report on conflicts of interest in defined benefit plans, we found that undisclosed business arrangements or conflicts of interest may have resulted in financial harm to some plans.<sup>47</sup> Given this risk, we asked that Congress consider amending ERISA to give Labor authority to recover plan losses against certain types of service providers even if they are not currently considered fiduciaries under ERISA. These findings may have similar implications for defined contribution plans, especially 401(k) plans.

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## Concluding Observations

As the retirement security of American workers increasingly depends on 401(k) plans, it is important that plan sponsors fulfill their fiduciary responsibilities in connection with such plans. Sponsors make decisions about the investment features of a 401(k) plan that carry significant fiduciary implications. Some, particularly those with small plans, may have limited time, specialization, knowledge, and ability to negotiate about service providers or investment funds. Absent a greater understanding of how sharing plan functions with their service providers or delegating functions to them may lead to confusion about fiduciary roles, some sponsors are likely to remain vulnerable to advisers or other providers whose compensation and affiliation may promote interests besides those of the plan, such as higher plan fees.

Since our 2006 report, Labor has made progress on its disclosure initiatives but some important fiduciary issues have yet to be fully addressed. In our previous reports, we asked Congress to consider amending ERISA to (1) explicitly require 401(k) service providers to

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<sup>46</sup>Statement of Bradford P. Campbell, Assistant Secretary of Labor, Before the Committee on Education and Labor, U.S. House of Representatives, Oct. 4, 2007.

<sup>47</sup>[GAO-07-703](#).

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disclose to plan sponsors the compensation they receive from other service providers and (2) give Labor authority to recover plan losses against certain types of service providers, even if they are not currently considered fiduciaries to that plan under ERISA. While Labor has proposed a regulatory change that could eliminate some of the confusion surrounding certain fiduciary obligations, it is unclear how closely the final regulation will follow the proposed rule. We continue to believe that changes to ERISA would help Labor in its efforts to promote sponsors' fiduciary oversight and be in the best interest of participants.

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## Agency Comments and Our Evaluation

We provided a draft of this report to the Department of Labor (Labor). Labor provided technical comments, which we have incorporated where appropriate.

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As agreed with your staff, unless you publicly announce its contents earlier, we plan no further distribution of this report until 30 days after its issue date. At that time, we will send copies of this report to the Secretary of Labor, as well as to other interested parties. We will also make copies available to others upon request. In addition, the report will be available at no charge on the GAO Web site at <http://www.gao.gov>. If you or your staff have any questions concerning this report, please contact me at (202) 512-7215 or [bovbjerg@gao.gov](mailto:bovbjerg@gao.gov). Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this report. GAO staff who made key contributions to this report are listed in appendix II.

Sincerely yours,

A handwritten signature in black ink that reads "Barbara D. Bovbjerg". The signature is written in a cursive style with a large, stylized initial "B".

Barbara D. Bovbjerg  
Director, Education, Workforce, and  
Income Security Issues

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# Appendix I: Scope and Methodology

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To determine common 401(k) plan features and which typically have important fiduciary implications as well as challenges sponsors face in fulfilling their fiduciary obligations, we collected and analyzed industry research and information from the Department of Labor (Labor), such as Bureau of Labor Statistics information, as well as previous GAO work. Although comprehensive data on 401(k) features is limited, industry research provides some indication of the prevalence of these features. The industry research that we reviewed has limitations, such as the lack of random sampling that prevents results generalizable to the universe of 401(k) plan sponsors. Thus, we used the following three sources of industry research that reached different audiences to corroborate one another, where possible. We also checked the reliability of the data by interviewing the surveyors about their methodology.

- Profit Sharing/401(k) Council of America's (PSCA) survey results are based on responses from 1,000 plan sponsors that have profit-sharing plans, 401(k) plans, or a combination of both and represent 1 to 5,000-plus employees. Thirty-nine of 1000 respondents had profit-sharing plans without a 401(k) component. The survey was mailed, faxed, or made available online to respondents and conducted from April to June 2007. The survey provides a snapshot as of the end of 2006. The survey response rate was 13 percent. PSCA is a national, nonprofit association of 1,200 companies and their 6 million plan participants. According to PSCA, it represents the interests of its members to federal policy makers and offers assistance with profit sharing and 401(k) plan design, administration, investment, compliance, and communication.
- Hewitt Associates' survey results are based on responses from 302 employers with mostly 1,000 employees or more. Twenty-nine percent represented Fortune 500 companies. The survey was conducted from March through June 2007. The survey was online, and paper copies of the questionnaire that included the survey Web site were also mailed out. Most respondents completed the survey online. The survey had a 6 percent response rate. Hewitt Associates is a human resources outsourcing and consulting firm.
- Deloitte Consulting received responses from 830 employers for its survey that was initially sent to over 3,000 contacts. The survey was sent by e-mail and made available online to a wide array of sponsors based on the contacts of Deloitte and partnering organizations, along with other interested sponsors who became aware of the survey. It is possible that contacts beyond the initial mailing completed the survey, so a response rate was not calculated. As with other industry surveys, Deloitte's survey covers a range of plan sizes but under-represents small plans, as measured

by number of participants. Deloitte is a professional services organization that provides pension consulting services.

In addition to analysis of industry research, we conducted a Web-based survey to learn more about how sponsors select plan features and oversee plan operations. In conducting our design work, we determined that a representative survey of sponsors would not be feasible for this study, given the methodological and administrative challenges associated with (1) establishing a sampling frame using Labor's Form 5500 data, (2) identifying appropriate points of contact for sponsors from the universe of over 400,000 plans, and (3) the perceived sensitivity of the survey's content and the willingness of sponsors to provide candid responses about their fiduciary obligations. To overcome the methodological and administrative challenges, we administered our survey in coordination with *Plansponsor Magazine* (*Plansponsor*). The sponsors who responded to our survey were members of *Plansponsor's* subscription list – which contains approximately 41,000 members who receive the organization's electronic newsletters and magazine.

*Plansponsor* used two methods for soliciting survey responses from their subscription list. These methods included the distribution of notices in their daily newsletter and a more targeted electronic mailing sent to the sponsors who responded to *Plansponsor's* 2007 Defined Contributions Survey. While there is some overlap between the sponsors that receive the daily newsletter and those who responded to *Plansponsor's* 2007 Defined Contributions Survey, *Plansponsor* estimates that the daily newsletter was distributed to approximately 41,000 subscribers. The targeted electronic mailing was sent to approximately 5,500 sponsors. Using *Plansponsor's* distribution estimates, we estimate the number of 401(k) sponsors that received our survey notification to be approximately 22,000. We received 448 usable responses to our survey, representing 594 plans. Labor's *Abstract of 2005 Form 5500 Annual Reports* shows that there are over 400,000 plans in the United States.

We do not have evidence to determine the extent to which our survey respondents are representative of the general sponsor population. Our respondent population excludes sponsors who do not belong to *Plansponsor's* subscriber list. Therefore, the extent to which our survey results provide useful information about the general population depends on whether or not there are differences between the excluded sponsors and those belonging to *Plansponsor's* subscriber list. For example, as members of *Plansponsor's* subscriber list, our survey respondents are self-selected recipients of a publication that provides information to managers

of pensions and 401(k) retirement plans. Because of their affiliation with *Plansponsor*, our survey respondents are likely to be more informed than the average sponsor, given that they are actively engaged in learning through the magazine. Although our survey respondents may be more informed than the average sponsor, *Plansponsor* affirms that their membership represents the overall sponsor demographic.

To minimize the variability of survey results, we took steps in the development of the questionnaire, the data collection, and data analysis to minimize nonsampling errors. For example, prior to administering the survey, the questionnaire was reviewed by an independent survey expert in our methodology group, as well as an official from *Plansponsor*. In addition, we conducted six pretests by telephone to determine the extent to which (1) the survey questions were clear, (2) the terms used were precise, (3) respondents were able to provide the information we were seeking, and (4) the questions were unbiased. We identified sponsors for the pretest through a series of questions posted in a survey that *Plansponsor* administers weekly to its subscribers. Sponsors were selected for the pretest based upon the total number of participants and the total amount of assets in the plan. We made changes to the content and format of the questionnaire based on the feedback we received.

The Web-based questionnaire was accessible through a secure GAO server. Sponsors completing the survey created usernames and passwords to access the survey. *Plansponsor* notified its subscribers of the survey's availability in its daily newsletter over a period of several weeks between March 2008 and May 2008. To solicit additional responses, *Plansponsor* sent a targeted electronic mailing to sponsors who responded to *Plansponsor's* 2007 Defined Contribution Survey, within the same period. No follow-up discussions with survey respondents were conducted for this study.

To further determine which features typically have important fiduciary implications and factors when making such decisions, as well as challenges sponsors face in fulfilling their fiduciary obligations when overseeing plan operations, we identified the relevant laws and regulations for 401(k) plans under ERISA. We interviewed and collected documentation from a variety of stakeholders, including plan sponsors, service providers, fiduciary advisers, industry and consumer associations, attorneys, and Labor. We also obtained their views on sponsors' awareness of fiduciary responsibilities and identified any challenges sponsors might face. We also collected and analyzed information on plan

sponsor oversight from other sources, such as the reports and testimonies from ERISA Advisory Council working groups.

To determine the actions that Labor takes to ensure that sponsors are fulfilling their fiduciary obligations and the progress Labor has made on its regulatory initiatives, we reviewed ERISA and Labor's regulations to clearly define Labor's authority to oversee the conduct of 401(k) plan sponsors in fulfilling their key fiduciary obligations. We reviewed Labor's enforcement strategies for overseeing plan sponsors (e.g., reviewing the types of complaints about fiduciary breaches). We reviewed the actions Labor has taken against plan sponsors and the reasons for such actions. We also reviewed the recent work of other GAO staff in order to provide an update on Labor's compliance assistance and outreach efforts; participated in certain fiduciary education seminars; and conducted follow-up interviews with agency officials about their current initiatives.

We conducted our review from January 2007 through June 2008 in accordance with generally accepted government auditing standards.

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# Appendix II: GAO Contact and Staff Acknowledgments

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## GAO Contact:

Barbara Bovbjerg, (202) 512-7215 or [bovbjergb@gao.gov](mailto:bovbjergb@gao.gov)

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## Acknowledgments:

The following team members made key contributions to this report: Tamara Cross, Assistant Director; Daniel Alspaugh, Analyst-in-Charge; LaKeshia Allen; Monika Gomez; Matthew Saradjian; Susan Baker; Susannah Compton; Mimi Nguyen; Walter Vance; and Craig Winslow.

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