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Dear Education and Labor Committee Member:

The Investment Company Institute and its members strongly support effective disclosure about service arrangements and fees of defined contribution employee benefit plans. We believe that, in engaging service providers, employers should be informed about the services and investments provided and about the fees incurred. Employees also should have access to information on plan investment options and fees paid by the plan.

While we strongly support sound disclosure legislation (including an alternative to be offered at the mark-up), we regret that we cannot support the fee disclosure provisions in H.R. 2989 (formerly H.R. 1984) in their current form. As written, the disclosure requirements are overly broad and imprecise. They will serve to confuse sponsors and participants, increase costs and complexity, and likely lead to decreased offerings of 401(k) plans. In addition, the legislation goes beyond disclosure and would distort a highly competitive and successful marketplace. We have many concerns about this legislation that we have communicated to the Committee, including the following:

H.R. 2989 uses imprecise language and terms defined very expansively (or not defined at all) that service providers will have to interpret broadly to avoid the bill's penalties, resulting in disclosure that is confusing to plan fiduciaries and participants and unnecessarily costly to prepare. For example, the bill confuses a 401(k) plan's *services* with its *investments*. As a result, accountants, valuation service providers, printers, and custodians who have no direct relationship with a plan could suddenly be subjected to detailed fee disclosure as a result of having provided services to investments used in a 401(k) plan. Disclosure focusing on those relationships, rather than the aggregate costs of an investment option, will needlessly complicate the information received by plan sponsors and participants, and create needless additional costs ultimately borne by 401(k) plans.

H.R. 2989 sets a dangerous precedent by effectively requiring plans to include an indexed investment option meeting specific requirements. It is inappropriate for the government to pick investment options for private 401(k) plans. Index funds are one effective investing solution and used in 70% of plans, but no single index fund is right for all retirement savers at all times and in all market conditions. Decisions about the investment menu of a 401(k) plan are best made by plan fiduciaries who can consider all options available now or in the future in designing plan offerings that will enhance employees' retirement security.

The current version of the legislation provides ample proof that government should not be making these decisions. The definition of the mandated index fund in the bill inexplicably excludes the most common equity index fund used in plans – an S&P 500 index fund. As of year-end 2008, 73% of all 401(k) assets invested in domestic equity index mutual funds was invested in S&P 500 index funds, versus 27% in all other types of domestic equity index funds. The record before the Committee does not support calling into question the judgments made by fiduciaries of the large number of plans that use S&P 500 index funds. Nor does it show that the judgments of fiduciaries of plans that currently do not include an index fund are wrong.

This defect is compounded by the fact that the bill would strip employers of vital fiduciary protection they have under current law unless the plan menu includes this very specific investment option. Proponents of the provision claim the bill does not require plans to include this type of index fund but rather merely makes the 404(c) fiduciary safe harbor unavailable to plans that do not include such an index fund. The reality is that virtually all participant-directed plans seek to comply with and obtain the safe harbor of 404(c) and thus the index fund provision in the bill is a mandate.

H.R. 2989 would favor one business model by requiring fees to be placed into arbitrary categories with no protection for service providers. The bill would require service providers to estimate and disclose fees in various service categories even if there are no separate charges for the services and the services are not available on a standalone basis. Since the estimates required under the bill will not be based on market transactions, service providers face significant liability risk even for reasonable attempts to comply with the requirement.

We understand that Ranking Member Kline will introduce a substitute amendment that meets the same disclosure objectives as H.R. 1984 as incorporated into H.R. 2989, but does so in a simpler and more effective way. The substitute legislation would provide meaningful disclosure to plan sponsors

and participants while addressing the concerns raised by members during H.R. 1984's mark-up in subcommittee last week. **We urge all members of the Committee to support the fee disclosure substitute amendment.**

We also understand that members of the Committee will introduce discrete amendments at the mark-up of H.R. 2989 to: 1) remove the investment mandate, and 2) provide that disclosure into arbitrary categories is required only to the extent charges are separately made or a service is separately available under a contract. **We urge all members of the Committee to support these amendments.**

We also understand that Representatives Holt and Wu may introduce an amendment to the investment advice title of the legislation (i.e. H.R. 1988) that will ensure that well-qualified investment advisers with no financial conflict are not prohibited from providing advice to participants in 401(k) plans. The need for investment advice from qualified providers is clear. **We urge all members of the Committee to support this amendment.**

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Getting disclosure rules "right" is a difficult undertaking. Disclosure requirements for 401(k) plans should be crafted carefully to provide clear, focused disclosure that assists fiduciary and participant decision-making. H.R. 2989, in our view, does not maintain the appropriate balance.

With very best regards.

Sincerely,

Paul Schott Stevens
President and CEO