

U.S. Chamber of Commerce



July 24, 2007

VIA ELECTRONIC MAIL

Office of Regulations and Interpretations
Employee Benefits Security Administration
Room N-5669
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, DC 20210

RE: Request for Information on Fee and Expense Disclosures to Participants in Individual Account Plans, 29 CFR Part 2550: RIN 1210-AB07

To Whom It May Concern:

On behalf of the U.S. Chamber of Commerce, we are writing this letter in response to the request for information from the Employee Benefits Security Administration (“EBSA”) on fee and expense disclosures to participants in individual account plans. The U.S. Chamber of Commerce is the world’s largest business federation representing more than three million businesses and organizations of every size, sector and region, with substantial membership in all 50 states. These comments have been developed with the input of member companies that sponsor individual account plans for their workers.

Ninety-two percent of all 401(k) plan participants are responsible for making investment decisions about their contributions to the retirement plan.¹ As such, it is important that these participants have the necessary tools and information to maximize their investment decisions. The Chamber supports disclosure and transparency of information that allows participants to make informed decisions about their investments. In order to be beneficial to participants, however, such information should be useful and easily understood. Moreover, it is equally important that disclosure requirements are not unduly burdensome to the employer – particularly if they do not provide meaningful information to the participant. Our comments stem from these concerns and represent our preliminary concerns and suggestions. As these issues evolve, we look forward to further conversations.

¹UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE, PRIVATE PENSIONS: *Changes Needed to Provide 401(k) Plan Participants and the Department of Labor Better Information on Fees* 5 (2007).

The Importance of Plan Fees Should be Considered in the Appropriate Context.

Over the past year, plan fees have been the subject of Congressional hearings, lawsuits, and newspaper articles. While highlighting the importance of fees in the investment context, this publicity has also possibly had the negative effect of implying that plan fees are the only factor to consider when making investment decisions. This could be detrimental to both participants and plan sponsors.

Participants making investment decisions should not rely solely on the fees associated with the investment option. While the fees are an important part of the consideration, there are several other factors that may be considered, such as historical performance and investment risk. In its testimony before Congress the Government Accounting Office (“GAO”) also recognized the importance of a variety of factors when making investment decisions, even noting that “[h]igher fees can also arise if an investment option has additional features.”²

Similarly, plan sponsors may begin to feel that they need to choose the least expensive investment option in order to avoid litigation claims. However, the lowest fees are not a guarantee of the best performance. Moreover, plan sponsors may desire services or features that are not included in the lowest fees. Therefore, it is necessary for plan sponsors to also consider expenses in the greater context of investment performance and features.

Moreover, despite the negative publicity, there has not yet been any proof that participants are paying excessive fees. In 1997, the Department of Labor had 50 401(k) plans analyzed by a fee expert to determine if they were reasonable. The expert found that although the fees were high, they were not unreasonable.³ Recently, the first court to look at the issue of plan fees determined that the plaintiffs did not have a claim and dismissed the case.⁴ Thus, it is imperative to remind both participants and plan sponsors that plan fees should not be the only consideration when making investment decisions. As such, we recommend that in any formal guidance EBSA clarify that plan fees and expenses should not be the only consideration in choosing an investment vehicle or service provider.

Fee Disclosures to Participants Should be Useful and Easy to Understand.

As you are aware, plan participants already receive many notices from the plan. While some participants may read and digest these notices, most participants bypass the information without receiving any benefit from it. For this reason, we believe that fee information to participants should be stated as clearly as possible. In addition, we recommend that this information be combined with other notices already required to be sent to the participant.

² *Id.* at 19.

³ *Id.* at 22.

⁴ *Hecker v. Deere & Co.*, No. 06-C-719-S (W.D. Wis. June 21, 2007).

We also suggest that information on fees should be limited to the amounts that are paid by the participant. There is general agreement that analyzing plan fees between providers, plans, and participants is complicated. Each individual plan sponsor determines how much of the fees they will pay and how much participants will pay. As mentioned above, plan sponsors consider a number of factors in addition to expenses when choosing a service provider. If the plan sponsor chooses to pay those additional costs and it does not impact the participants' accounts, then this information is not relevant to the participants and may create unnecessary confusion.

Disclosure Requirements Should Not be Unduly Burdensome.

Plan sponsors are subject to numerous statutory and regulatory requirements and must constantly balance costs against the benefits of maintaining the retirement plan. Consequently, it is important to minimize the burdens on plan sponsors. In its 1994 report, the ERISA Advisory Council noted this concern:

The working group wants to avoid a rule that is so burdensome that it discourages the adoption and maintenance of defined contribution plans. Section 401(k) plans in particular have become popular and convenient investment vehicles for the US workforce. Disclosure rules should not be so onerous that they impede this popular and useful savings vehicle.⁵

We very much agree with this statement and urge this to be kept in mind as the process moves forward.

We are aware that various alternatives are being considered and several specific recommendations are being made through this comment process. We do not have a specific proposal for the disclosure format, but have several general recommendations. We recommend that disclosure information be as efficient in length as possible to keep participants from being overwhelmed with information. If possible, we also recommend that fee information be included as part of other notice requirements to minimize the amount of notices that are being created and sent. For example, including fee information with the participant benefit statement or the summary annual report should be considered. Finally, we recommend that plan sponsors be given flexibility in the method of distribution of the notice (electronic, paper, intranet, etc.) and in design of the notice. Because plans and investment options vary significantly, it could be a tremendous burden on some plan sponsors to have to comply with rigid criteria.

Small Business Plan Sponsors May Require Additional Consideration.

One area of particular concern in the benefits community is encouraging small business owners to establish retirement plans. Small businesses in general face significant obstacles and many view retirement plans as yet another potential obstacle and, therefore, choose not to establish retirement plans. The benefits community – including EBSA and the Department of Labor (“DOL”) – has made tremendous efforts to incentivize and encourage small business owners to establish retirement plans.

⁵ ADVISORY COUNCIL ON EMPLOYEE WELFARE AND PENSION BENEFIT PLANS, ERISA ADVISORY COUNCIL, REPORT OF THE WORKING GROUP ON FEE AND RELATED DISCLOSURES TO PARTICIPANTS 5 (2004).

Consequently, we are concerned about fee disclosure requirements possibly undoing all of the positive steps that have been made to encourage small business plan sponsors.

Small business owners are very sensitive to administrative and costs increases. Due to their size and resources, small business owners often feel these burdens sooner and more deeply than their larger counterparts. In addition, small business owners are often subject to higher administrative fees than larger companies. A report sponsored by the Small Business Administration found that the administrative costs for large companies (over 500 employees) averaged \$30 to \$50 per participant while the administrative costs for mid-size companies (500-199 employees) were slightly higher at \$50 - \$60 per participant. For the smallest companies, however, (200 and fewer employees), the average administrative costs jumped to over \$400 per participant.⁶ One reason for the higher cost is that there is a minimum administrative cost to establishing and maintaining a retirement plan and because small companies have fewer employees to spread the costs over, the costs per participant can become significantly higher.⁷ Therefore, it is critical to keep this distinction in mind when discussing the appropriateness of plan fees.

Finally, we should not underestimate the small business owners concern over additional liabilities (even if they are only perceived). As we mentioned above, there has been a lot of negative publicity surrounding plan fees. A small business owner who does not have the resources to analyze plan fees or to hire an analyst may become wary of offering an individual account plan at all. In addition, some small business owners may have a difficult time obtaining fee information from their service providers in a format that they can easily digest and provide for their participants. The ERISA Advisory Council warned that “a balance must be struck between what can reasonably be expected of small plan sponsors and the potential capabilities of larger plan sponsors.”⁸ As specific recommendations are being considered, we urge EBSA to continue its efforts to encourage small business plan sponsorship and give the situation of small business owners additional consideration as warranted.

Guidance on Plan Fee Disclosure is Best Provided by the Department of Labor.

In its report, the GAO recommended a number of amendments to the Employee Retirement Income Security Act.⁹ However, we believe that guidance is best provided through the DOL and EBSA. Changes to statutes require a significant amount of time to research and change. Regulatory guidance, however, is easier to adjust while still providing a critical opportunity for comment and discussion. As we have seen, changes in the financial industry are constantly occurring. In order to ensure that plan fee disclosures remain useful, we recommend that the DOL and EBSA provide this guidance so that necessary changes to disclosures can be made in a relevant and timely manner.

⁶ JOEL POPKIN AND COMPANY, SMALL BUSINESS ADMINISTRATION, OFFICE OF ADVOCACY, COST OF EMPLOYEE BENEFITS IN SMALL AND LARGE BUSINESSES 38 (2005).

⁷ *Id.*

⁸ ADVISORY COUNCIL ON EMPLOYEE WELFARE AND PENSION BENEFIT PLANS, ERISA ADVISORY COUNCIL, REPORT OF THE WORKING GROUP ON FEE AND RELATED DISCLOSURES TO PARTICIPANTS 5 (2004).

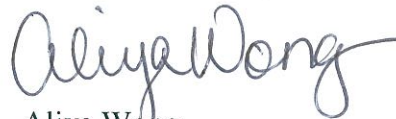
⁹ UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE, PRIVATE PENSIONS: *Changes Needed to Provide 401(k) Plan Participants and the Department of Labor Better Information on Fees* 4 (2007).

As more workers become dependent on individual account plans for retirement, it becomes increasingly important to provide participants with information that will allow them to make well-informed decisions. We very much appreciate EBSA's request for information on this issue and the methodical approach it has taken on plan fee disclosures. Given the complicated nature of plan fees, it is not a simple task to discern which information and what format will prove most meaningful to participants – rather, it will take input and dialogue from many different parties and experts. Consequently, we appreciate the opportunity to express our concerns and look forward to future conversations with you and other interested parties.

Sincerely,



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