



Statement of the U.S. Chamber of Commerce

ON: 401(K) FEE DISCLOSURE: HELPING WORKERS SAVE FOR RETIREMENT

TO: THE COMMITTEE ON HEALTH, EDUCATION, LABOR AND PENSIONS OF THE UNITED STATES SENATE

BY: PAUL HUNT

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The Chamber's mission is to advance human progress through an economic, political and social system based on individual freedom, incentive, initiative, opportunity and responsibility.

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.

More than 96 percent of the Chamber's members are small businesses with 100 or fewer employees, 70 percent of which have 10 or fewer employees. Yet, virtually all of the nation's largest companies are also active members. We are particularly cognizant of the problems of smaller businesses, as well as issues facing the business community at large.

Besides representing a cross-section of the American business community in terms of number of employees, the Chamber represents a wide management spectrum by type of business and location. Each major classification of American business -- manufacturing, retailing, services, construction, wholesaling, and finance -- is represented. Also, the Chamber has substantial membership in all 50 states.

The Chamber's international reach is substantial as well. It believes that global interdependence provides an opportunity, not a threat. In addition to the U.S. Chamber of Commerce's 105 American Chambers of Commerce abroad, an increasing number of members are engaged in the export and import of both goods and services and have ongoing investment activities. The Chamber favors strengthened international competitiveness and opposes artificial U.S. and foreign barriers to international business.

Positions on national issues are developed by a cross-section of Chamber members serving on committees, subcommittees, and task forces. More than 1,000 business people participate in this process.

TESTIMONY BEFORE
THE COMMITTEE ON HEALTH, EDUCATION, LABOR AND PENSIONS
OF THE UNITED STATES SENATE,
ON BEHALF OF THE U.S. CHAMBER OF COMMERCE
ON
401(K) FEE DISCLOSURE: HELPING WORKERS SAVE FOR
RETIREMENT
BY
PAUL HUNT
WEDNESDAY, SEPTEMBER 17, 2008

Thank you, Chairman Kennedy, Ranking Member Enzi, Senator Harkin and members of the Committee for the opportunity to appear before you today to discuss the appropriateness of retirement plan fees. My name is Paul Hunt, President of Millennium Advisory Services, Inc., which is an SEC registered investment advisory firm. I am also President of Millennium Capital Management of Virginia, Inc., which does traditional investment business through our broker/dealer relationship with Triad Advisors, Inc. I am pleased to be able to testify today on behalf of the U.S. Chamber of Commerce where I am a member of its Small Business Council and the Corporate Leadership Advisory Council. The Chamber is the world's largest business federation, representing more than three million businesses and organizations of every size, sector, and region. More than ninety-six percent of the Chamber members are small businesses with fewer than 100 employees.

Millennium Advisory Services is an investment advisor for several retirement plan clients, and employees of Millennium Capital Management are registered representatives on several other retirement plans. We are also a small business that sponsors our own retirement plan.

As a provider of services to small business plan sponsors, I believe that it is critically important to consider the impact of any potential legislation on the small business plan sponsor. For that reason, I appreciate the opportunity to discuss the issue of plan fee disclosure and the potential impact on small business plan sponsors.

INTRODUCTION

According to the U.S. Small Business Administration, small businesses (less than 500 employees) represent 99.9% of the total firms and more than half of the workforce in the United States.¹ Clearly, ensuring adequate retirement security for all Americans means encouraging small businesses to participate in the private retirement system. Small businesses, in general, face significant hurdles and may view retirement plans as yet another potential obstacle and therefore, choose not to establish them. Thus, there have been tremendous efforts to provide incentives and encourage small business owners to establish and maintain retirement plans.² Consequently, it is important to give special consideration to potential burdens that new legislation may impose on small businesses.

Despite the obstacles, and due to various incentives, small businesses are having success in the retirement plan arena. Small businesses with less than 100 employees cover more than 19 million American workers.³ Most of these small business employees enjoy generous annual retirement plan contributions from their employers, often in the range of 3 to 10 percent of compensation. Thus, the small business qualified retirement plan system is successful in delivering meaningful retirement benefits for its employees and all efforts should be made to encourage its continued success.

My comments today focus on the concerns of small business plan sponsors as they relate to additional fee disclosure requirements. While there have been several bills introduced in Congress on fee disclosure and several sets of regulations issued by the Department of Labor, our comments today focus on general principles and concerns rather than focusing on specific provisions in any one piece of legislation or regulation. Clarification of fee disclosure requirements can be very helpful to small business plan

¹U.S. Small Business Administration Office of Advocacy estimates based on data from the U.S. Dept. of Commerce, Bureau of the Census, and U.S. Dept. of Labor, Employment and Training Administration.

² Under the Economic Growth and Tax Relief Reconciliation Act of 2001 (“EGTRRA”) that was made permanent by the Pension Protection Act of 2006 (“PPA”) small businesses may claim a tax credit for establishing a retirement plan equal to 50% of qualifying costs up to \$500 per year for the first three years. In addition, the PPA instituted a number of additional positive reforms including the creation of the Roth 401(k), simplification of a number of complex administrative requirements, and the creation of the DB(k) for small businesses.

³Patrick J. Purcell, Congressional Research Service (CRS) Report for Congress, Social Security Individual Accounts and Employer-Sponsored Pensions, February 3, 2005, Table 2. Employee Characteristics by Employer Retirement Plan Sponsorship, 2003 at CRS-5.

sponsors to ensure that they are aware of the services that they are receiving and the prices that they are paying. In order to ensure that plan fee legislation helps small businesses, we ask Congress to consider our following concerns.

SMALL BUSINESS PLAN CONCERNS

Costs Considerations are Important to Small Business Plan Sponsors. Of course, small business owners—like all business owners—are concerned about costs. The costs of maintaining a retirement plan may be a greater consideration for a small business owner, because once a small business decides to establish a retirement plan it is often subject to higher administrative fees than larger companies. A report 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 to 199 employees) were slightly higher at \$50 to \$60 per participant. For the smallest companies, however, (200 and fewer employees), the average administrative costs jumped to over \$400 per participant.⁴ One reason for the higher cost is that there is a minimum administrative cost to establishing and maintaining a retirement plan and small companies have fewer employees to spread the costs over; therefore, the costs per participant can become significantly higher.⁵ Thus, it is critical to keep this distinction in mind when discussing the appropriateness of plan fees.

Moreover, small business plan sponsors have a personal stake in the cost and operation of the plan since they are also generally plan participants. At the start, small business owners typically solicit multiple bids for the contract and ask the potential service providers questions about the plan before signing up for services. Once the plan is established, the small business owner, who is generally also a plan participant, has a vested interest in keeping fees down for both the plan and the participants.

Anticipated Liabilities May Drive Small Business Owners Away from Plan Sponsorship. We should not underestimate the small business owner's concern over additional liabilities (even if they are only perceived). Over the past year, plan fees have been the subject of congressional hearings, lawsuits, and newspaper articles. While this publicity has highlighted the importance of plan fees, it has also created a negative impression of plan fees and plan sponsors. Thus, there is a heightened scrutiny of plan fees. A small business owner who does not have the resources to hire an outside 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

⁴ Joel Popkin and Company, Small Business Administration, Office of Advocacy, Cost of Employee Benefits in Small and Large Businesses 38 (2005).

⁵ *Id.*

sponsors.”⁶ For example, statements that imply that there is an “average” amount for plan fees can be misleading to participants in small business plans for the reasons mentioned above and lead to additional liability for the plan sponsors. Therefore, it is critical to proceed cautiously and thoroughly consider all implications associated with any future changes or requirements.

Onerous Administrative Burdens Will Negatively Impact Small Business Plan Sponsorship. 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. Small business owners generally have fewer resources and, therefore, have greater concerns about taking on additional administrative responsibilities. Unlike a large company that may have a dedicated human resources or benefits professional or even an entire department—this function in a small business may be one of several other duties of an employee or, more likely, the owner. Therefore, small business owners will be less likely to establish a retirement plan, if there are going to be significant administrative burdens that they do not have the resources to cover.

Bundled Service Arrangements are Advantageous to some Small Businesses. For both administrative and costs concerns, there are employers that may prefer to use bundled services for their retirement plans. In terms of administration, it is one-stop shopping. Rather than dealing with several different service providers, the plan sponsor can deal with only one or two; thereby, maximizing the allocation of his or her resources by minimizing administration responsibilities. Furthermore, the pricing of bundled services may be more attractive to some plan sponsors. Again, for a small business plan sponsor who is trying to maximize resources this is an important consideration. Congress should consider the need to increase plan sponsorship in the small business market if it considers any changes to bundled fee arrangements.

Moreover, as an entrepreneur and member of the Chamber, I believe that services and products should be determined by the market and not by Congress. There is a need and support for both bundled and unbundled services. The choice of which service model to use should be made by the consumer—in this case the plan sponsor—based on its needs and resources. We sincerely urge Congress not to mandate one type of service arrangement over another.

Bundled Service Arrangements are Consistent with Fiduciary Obligations. The fiduciary of the trust (normally the employer) must operate the trust for the exclusive purpose of providing benefits to participants and their beneficiaries and defraying reasonable expenses of administering the plan.⁷ In other words, the fiduciary has a duty under the Employee Retirement Income Security Act of 1974 to ensure that any expenses of operating the plan, to the extent they are paid with plan assets, are reasonable. We do not believe that bundled services in any way impede the plan sponsor’s ability to carry

⁶ 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).

⁷ ERISA section 404(a)(1).

out its fiduciary duties. On the contrary, as long as the plan sponsor receives information that includes all of the services provided and the total costs, he or she should be able to compare this to information from other bundled providers as well as unbundled providers and determine whether the fees, taken in totality, are reasonable for the services being provided. As long as the plan sponsor is fully informed of the services being provided, it can compare and evaluate whether the overall fees are reasonable without having to analyze fees on an itemized basis.

GENERAL PRINCIPLES ON PLAN FEE DISCLOSURE

For this hearing, we were asked to specifically highlight the concerns of small business plan sponsors. Of course, the issue of plan fee disclosure concerns Chamber members of all sizes; therefore, it is important to share the Chamber's general principles on plan fee disclosure. Over the past year, the Chamber has testified before the House of Representatives and submitted several sets of comments to the Employee Benefits Security Administration (EBSA).⁸ The Chamber's comments reflected not only concerns about new rules on plan fee disclosures, but also formed the principles with which the Chamber views any forthcoming reforms to plan fee disclosures. These principles are outlined below.

The Importance of Plan Fees Should be Considered in the Appropriate Context. Over the past year, plan fees have received a lot of publicity. 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 Accountability Office (GAO) also recognized the importance of a variety of factors when

⁸ On September 8, 2008, the Chamber submitted comments to the Department of Labor on the proposed rule on Fiduciary Requirements for Disclosure in Participant-Directed Individual Account Plans. On March 31, 2008, the Chamber testified before the Department of Labor on the disclosure of fees between service providers and plan sponsors. On February 11, 2008, the Chamber submitted joint comments with the ERISA Industry Committee, the College and University Professional Association for Human Resources, the National Association of Manufacturers, the Profit Sharing / 401k Council of America and the Society for Human Resource Management to the Department of Labor on the proposed regulations issued under ERISA section 408(b)(2). On October 30, 2007 Harold Jackson, President and CEO of Buffalo Supply, Inc. testified on behalf of the Chamber before the House Ways and Means Committee on the appropriateness of plan fees from the perspective of the small business plan sponsor. On October 4, 2007 the Chamber presented a joint witness in a hearing before the House Education and Labor Committee on the 401(k) Fair Disclosure for Retirement Security Act of 2007 (H.R. 3185). On July 24, 2007, the Chamber submitted comments to the DOL in response to their request for information on Fee and Expense Disclosures to Participant Account Plans.

making investment decisions, even noting that “higher fees can also arise if an investment option has additional features.”⁹

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.

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 provided to participants should be stated as clearly as possible. In addition, the Chamber recommends that this information be combined with other notices already required to be sent to the participant.

The Chamber also suggests 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 2004 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.¹⁰

The Chamber very much agrees with this statement and urges this to be kept in mind as the process moves forward.

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* 19 (2006).

¹⁰ 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).

The Chamber does not have a specific proposal for the disclosure format, but has 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. For all of the reasons mentioned above, we believe that it is critical to consider the additional burdens and obstacles that may be placed on small business plan sponsors when considering possible legislation.

CONCLUSION

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. 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.

In particular, the concerns of small business plan sponsors need additional consideration. Unreasonable administrative requirements, additional liabilities, and potential costs increases could drive small businesses away from the private retirement system. At a time when small business retirement plans are beginning to experience success, we should encourage these efforts by creating requirements that fully consider the concerns and possible consequences to small business plan sponsors. We appreciate the opportunity to express our concerns and look forward to future conversations with you and other interested parties.