CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

R. BRUCE JOSTEN
EXECUTIVE VICE PRESIDENT
GOVERNMENT AFFAIRS

1615 H STREET, N.W.
WASHINGTON, D.C. 20062-2000
202/463-5310

October 18, 2007

The Honorable George Miller
Chairman
Committee on Education and Labor
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Miller:

The U.S. Chamber of Commerce thanks you for holding the hearing on "H.R. 3185: The 401(k) Fair Disclosure for Retirement Security Act of 2007" and giving us the opportunity to comment on the legislation. We ask that this statement be included in the record of the hearing.

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 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. The Chamber is 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. 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.

Sincerely,

R. Bruce Josten

Statement of the U.S. Chamber of Commerce

ON: **REGARDING THE HEARING ON H.R. 3185, "401(k) FAIR DISCLOSURE FOR RETIREMENT SECURITY ACT OF 2007"**

TO: **HONORABLE GEORGE MILLER OF THE COMMITTEE ON EDUCATION AND LABOR**

BY: **ALIYA WONG & RANDY JOHNSON, U.S. CHAMBER OF COMMERCE**

DATE: **OCTOBER 17, 2007**

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.

Statement for the Record by Randy K. Johnson, Vice President of Labor, Immigration & Employee Benefits & Aliya Wong, Director of Pension Policy

U.S. Chamber of Commerce

October 17, 2007

The Chamber joined the ERISA Industry Committee, the Profit-Sharing/401(k) Council of America, the Society of Human Resource Management, and the National Association of Manufacturers in testimony and fully supports the statements made in the oral and written testimony of Lew Minsky on behalf of all of the organizations. This statement presents additional thoughts and concerns of Chamber members.

INTRODUCTION

The Chamber appreciates the concern for greater transparency in plan fees and the effort to the address the concern. The Chamber fully supports transparency of expenses and encourages further disclosure of plan fees. The Chamber remains, however, wary of disclosures that do not provide meaningful disclosure while increasing the administrative burdens on employers.

The Chamber also believes that it is particularly important to not overstate the current situation. Despite the negative publicity, there has not yet been any proof that participants are paying excessive fees. In 1997, the Department of Labor (DOL) had fifty 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.[1] 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.[2] Consequently, it is important to approach potential reforms as improvements to a system that is working and not as rules needed to fix a broken system.

PRINCIPLES ON PLAN FEE DISCLOSURE

On July 24, the Chamber submitted a letter to the Employee Benefits Security Administration (EBSA) in response to the request for information on fee and expense disclosures to participants in individual account plans. The Chamber's comments reflected not only concerns about new rules on plan fee disclosures, but also formed the principles with which the

---

[1] 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).
[2] Hecker v. Deere & Co., No. 06-C-719-S (W.D. Wis. June 21, 2007).

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 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.

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, the Chamber believes that fee information 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 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 U.S. workforce. Disclosure rules should not be so onerous that they impede this popular and useful savings vehicle.[3]

[3] 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 very much agrees with this statement and urges this be kept in mind as the process moves forward.

The Chamber does not have a specific proposal for the disclosure format, but has several general recommendations. The Chamber recommends that disclosure information be as efficient in length as possible to keep participants from being overwhelmed with information. If possible, the Chamber also recommends 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, the Chamber recommends 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 has made tremendous efforts to provide incentives and encourage small business owners to establish retirement plans. Consequently the Chamber is concerned that fee disclosure requirements could possibly undo 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 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 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 because small companies have fewer employees to spread the costs over, the costs per participant can become significantly higher.[5] Therefore, it is critical to keep this distinction in mind when discussing the appropriateness of plan fees.

Finally, the small business owners concern over additional liabilities (even if they are only perceived) should not be underestimated. As 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

[4] JOEL POPKIN AND COMPANY, SMALL BUSINESS ADMINISTRATION, OFFICE OF ADVOCACY, COST OF EMPLOYEE BENEFITS IN SMALL AND LARGE BUSINESSES 38 (2005).
[5] *Id.*

between what can reasonably be expected of small plan sponsors and the potential capabilities of larger plan sponsors.[6]"

Guidance on Plan Fee Disclosure is Best Provided by the Department of Labor. In its report, the Government Accountability Office recommended a number of amendments to the Employee Retirement Income Security Act.[7] However, the Chamber believes 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. Changes in the financial industry are constantly occurring. In order to ensure that plan fee disclosures remain useful, the Chamber recommends that the DOL and EBSA provide this guidance so that necessary changes to disclosures can be made in a relevant and timely manner.

ANALYSIS OF HR 3185

Service Disclosure Statements (Sec. 2) – The DOL's pending proposed regulatory changes under code section 408(b)(2) will result in similar disclosures, provided at the same general point in time, as this new provision. The provision in HR 3185 is in addition to, and duplicative with, the existing fiduciary requirement to insure that plan fees paid with plan assets are reasonable.

Unbundling (Sec. 2) - The provision requires the "unbundling" of a bundled provider that incorporates all services under a single price or broad category of prices. Often services provided in bundled arrangement are provided by various affiliates and break down would be difficult and not meaningful. Provided that the plan administrator is completely aware of all the services included in a bundled arrangement and the total costs for such services, the Chamber believes believe that "unbundling" is unnecessary and could actually increase administrative costs and fees for participants.

Conflicts of Interest (Sec. 2) – We are concerned about the intent of this provision. "Conflict of interest" is not defined, but it could mean arrangements that constitute a prohibited transaction prohibited under current law. As such, it is a redundant requirement. On the other hand, if it is a subjective decision, a service provider could decide to not make a disclosure. The Chamber believes that further clarification of this concept is required if it remains part of the bill.

Share Class Disclosures (Sec. 2) - The purpose of the share class disclosure requirement is not clear. While 401(k) plan participants generally pay "retail" prices and frequently pay far less, there are myriad costs associated with administering a 401(k) plan that do not apply to individual ownership of a mutual fund. These disclosures could result in additional costs for participants in some plans—particularly new small business plans. A comparison with a "retail share" in this situation could result in an incorrect conclusion that the plan was paying

[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] 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).

unreasonable expenses. This type of analysis might also ignore the effect on a participant's overall costs due to the preferential tax treatment of qualified plans and the benefits of employer contributions.

Availability of Service Disclosure Statement to Participants (Sec. 2) – It is not clear how this information will assist plan participants or beneficiaries in understanding the impact of fees on their investment decisions. Presumably, the information will include fees paid for with corporate, not plan, assets. Fees paid in this manner have no impact on participants. Moreover, plans are currently required to provide a summary plan description, a statement of material modification, and an annual report. Additionally, the Form 5500 is available to plan participants and beneficiaries and the revised Form 5500 will provide extensive information about plan expenses and should remove the need for this new requirement. Moreover, this provision could result in making proprietary information publicly available without resulting in lower plan fees.

Notice of Investment Election Information (Sec. 2) – The Chamber agrees that fee information should not be provided in a vacuum. However some of these attestations, such as risk level, an opinion whether or not an investment is designed to achieve retirement security, and the benchmarking requirement are problematic. For example, a "benchmark retirement plan investment" does not currently exist. The provision is especially problematic for investments that are not mutual funds or based on mutual funds, such as separately managed accounts, because some of the required data may not be available.

Fee Menu – The Chamber supports the concept of a fee menu, but believe that flexibility should be provided to ensure that the plan administrator can tailor the disclosure to meet the needs of plan participants. The requirement to disclose a "conflict of interest" will likely result in a lengthy legal-like document that confuses most participants, provides no information that will assist in the investment decision, and adds considerably to the fee menu. Receiving such information would only increase the likelihood that the entire document will be ignored. In addition, the Chamber believes that the fee information should be provided with other information related to investment options so as to not overemphasize the importance of fees in relation to other information.

Annual Participant Benefit Statements (Sec. 2) – Recordkeeping systems are not currently able to meet all the requirements of this provision. Additional costs to participants will result from the system changes needed to comply. Much of the required data is already required to be disclosed in the new benefit statement requirements included in the Pension Protection Act, yet there is no coordination of the two requirements. The provision to calculate earning and fees assessed during the year will be particularly difficult in situations in which an investment change occurred during the year or for partial-year participation. Fees for investments made through a brokerage window may be impossible for a recordkeeper to track. The performance-benchmarking requirement will create significant compliance issues, especially for non-mutual fund based investments.

In addition, detailing the amount the participant needs to save each month to retire at age 65 may provide misleading information to the participants. The administrator would have to know the participants' intimate financial information as well as their unique post-retirement

needs to even begin to produce a number that would be useful to the participants. Even though this is not a requirement but an option for the administrator, it subjects the administrator to additional liability. This is best left to the participants' financial advisors or to software programs provided by investment firms.

Enforcement of Notice Provisions (Sec. 2) – Under the amended provision, plan administrators may be held liable for failures by service providers to provide accurate or timely data. The Chamber believes that the DOL approach is fairer because it provides sanctions against plan administrators *and* service providers under the prohibited transactions rules.

Effective Date (Sec. 2) – The transition period for implementing the new requirements is not sufficient. Some plans could face an effective date within days of enactment; others could have almost a full year. In either case, the period is inadequate for plan sponsors to get needed systems in place.

Minimum Investment Option Requirement (Sec. 3) – The Chamber opposes the mandate of one type of investment option over another. Currently, plan sponsors are required by fiduciary obligations to choose appropriate investment options. Plan sponsors often hire professionals to aid them in this decision. If investment options are mandated, plan sponsors may choose the mandated option as a safe harbor for fiduciary liability and forego a more detailed analysis of investment options. Moreover, it is not clear how mandating an investment option will reduce fees or otherwise create greater transparency.

Advisory Council (Sec. 4) – H.R. 3185 would implement a new council within the DOL whose duties would be to solicit information on issues affecting plans and to consider such submissions; hold hearings as appropriate; issue advisories on best practices; present research; issue benchmarking information; establish a website; issue annual reports, and make recommendations. The Council would also issue an annual report of retirement trends and issues to Congress and the public. The DOL already has an Advisory Council on Employee Welfare and Pension Benefit Plans that was created in ERISA. The Council is comprised of representatives of employees, employers, and service providers. This Council has played a critical role in the DOL's current initiatives involving fee disclosures as well as numerous other issues pertaining to ERISA plans. It is not clear if the Council added by H.R. 3185 would replace the current Advisory Council or be an addition. In either case, the Chamber believes that creation of an entirely new council is unnecessary.

Enforcement and Review by the DOL (Sec. 5) – The Chamber is concerned about the proposed enforcement scheme as it includes the public dissemination of information and the provision of information to other agencies with a notice, hearing, or appeal procedure. Enforcement provisions are important but they must also be fair and provide opportunities to correct mistakes by any party.

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. Consequently, the Chamber appreciates the opportunity to express its concerns and look forward to future conversations with you and other interested parties.