From: Dave Loeper [mailto:DLoeper@wealthcarecapital.com]
Sent: Tuesday, July 24, 2007 9:06 AM
To: EBSA, E-ORI - EBSA
Subject: Comment on 401(k) fee disclosures

Thank you for seeking comments on this important topic. As the CEO of a small business (an SEC Registered Investment Advisor) and a trustee of our company's 401(k) that covers 25 participants, I offer a perspective both as an advisor to ERISA plans, as well as a consumer of the 401(k) products offered in the marketplace.

I am very familiar with ERISA regulations and have an extensive background in the industry. I was appointed by the Governor of Virginia to serve on the Investment Advisory Committee of the $30 billion Virginia Retirement System, chaired the Advisory Council for IMCA (Investment Management Consultants Association) and have been active in various ERISA advising capacities in my 22 plus year history in the financial services industry. I have also written a book on the 401(k) fee disclosure problem that will be published this coming fall.

It is clear that consumers are enormously unaware of what, if anything, they are paying in their 401(k). The recent GAO study commissioned by Congressman George Miller of California clearly highlighted this fact. Because of the legal structure of 401(k) trusts, many consumers largest investment asset is exempt from the normal securities regulations designed to protect them, and disclose to them, the most basic information that would otherwise be required to be provided to them if their investment assets were outside of a 401(k) in something like an IRA rollover or a brokerage account. From a securities regulation and disclosure perspective, in essence the trustees of a 401(k) plan are the "consumer" and insulate plan participants from information that in any other circumstance they would otherwise be provided. Additionally, it does not help that many securities regulations designed to provide disclosure and protection to the general public are exempt when dealing with ERISA plan trustees under the premise that such plan trustees are "sophisticated" and thus do not require these basic protections. This is often an erroneous assumption.

It is obviously not the DOL's purview to amend securities industry regulations. However, since many of these regulations were designed to protect and disclose important information to the general investing public, one must wonder how much more of a general investing public exists outside of the 47 million plus participants in 401(k) plans? If they do not meet the definition of the general investing public, who does?

For example. If one purchases a mutual fund, it is required that a prospectus be provided, UNLESS you purchase the mutual fund through your 401(k) plan. The prospectus provides a lot of information about fees and costs, investment strategy, approach and management. Unfortunately, in an attempt to provide general consumers with information the prospectus has become an unwieldy document that is too infrequently read. The NASD has been working on improving this issue to make the information more consumer friendly. But, the bottom line is that if I personally set up a $250 monthly deposit from my checking account either directly with a mutual fund company or through a brokerage firm I would be provided with a prospectus for the fund(s) I purchase. If I do the same thing in my 401(k) it is not provided to me. Of course, the mutual fund industry will argue that it would be too costly to provide all participants with a prospectus, but in today's world of electronic access, shouldn't the prospectus at least be available online? Couldn't the 401(k) statement include a statement reply card that says "please read the prospectus for important information before investing" as would otherwise be provided to an investor?

The same holds true for investment advisory services. Investment advisors (both state and SEC registered) are required to provide their clients with a written contract that discloses advisory fees,

etc. Additionally, they are required to provide Form ADVII (or a brochure with the same information) to clients disclosing the methods used by the advisor, the background information of key personnel, etc. Both of these are already provided to the trustees. Shouldn't such contracts and disclosure documents also be available to a participant that is hiring these advisors through their 401(k) deferrals? Again, could this not be electronically made available? Once again, if the participant directly hired the advisor in any other form, they would receive and have a chance to review both documents, but because they are a participant in a 401(k) plan, this information is not normally provided.

Wrap accounts combine both brokerage and advisory services. They are popular products for IRA rollovers. If a consumer enters a wrap agreement directly for their IRA rollover, they are required by securities laws to receive all of the documents outlined above (advisory contract, FormADVII and prospectuses on any funds used in the account) but here again when the exact same service is used for their 401(k) they are not normally provided any of these documents. Again, couldn't they at least be made available electronically or by request?

Variable annuities take mutual funds (or other types of sub accounts) and assemble them into a package that combines the investment vehicle into an insurance product. When purchased directly by the consumer, contracts and prospectuses are provided that outline fees, expenses, surrender charges, M&E costs and contractual benefits. Here again though, when used in a 401(k) these contracts are not generally provided nor available to participants.

These are just a few of the examples of how 401(k) plans enable product vendors and advisors to in essence usurp the basic industry rules designed to protect the general public. I am sure the industry vendors will lobby hard to prevent providing this information (saying the expense to provide it to all participants is excessive), but since all of these documents are already provided to trustees, the minimum DOL regulations should treat these other documents like Form 5500 where participants could at least request a copy and bear the expense of doing so. Alternatively, it would be better that any of these applicable documents that would be otherwise provided to any investor outside of a 401(k) plan be required to be available electronically to any plan that offers a 401(k) website, and that they are obvious and clearly highlighted as "Important Disclosure Documents about the fees, expenses and services provided under your 401(k)" upon the participant's login to the website. Even better than these most basic disclosures that anyone would normally receive outside of their 401(k) would be a requirement that participants' statements must provide the expense ratio, wrap fees, custodial fees and contract M&E fees they pay...in essence any asset based fee on the participant statement as an annual expense. This is not burdensome to the vendors and would add nothing to the cost of participant statements. My company's prior vendor did not provide this information on the statement, but some are now doing so and I would suggest that the DOL hold the vendors and trustees responsible for making sure that participants know any fee charged against their balance that is based on an asset based fee and leave the rules at that. Let the vendors and trustees find the most cost effective means of doing so. Some might choose to prepare a simple annual summary document that merely discloses the annual expense ratio (of all of the combined asset based charges) of each investment selection, and perhaps (following the NASD lead for expense ratio treatment in a prospectus) shows an example of the fees paid for the next five years for a $10,000 investment.

Administration charges are another trick that vendors use to hide their expenses. Form 5500 should be amended to add one line that takes the total annual costs of the plan (excluding benefits and investment expenses) and divides it by the average number of participants to come up with a "Average Per Participant" administration cost. It should only include expenses that are not paid for by the sponsoring company, and cover only those expenses that are not asset based (things like advisory charges that are charged per participant instead of asset based, hard dollar consulting fees, audit fees, custody charges that are not asset based, etc. should be included to the extent they are NOT paid for by the sponsoring company.) This summary number per participant would be reported on Form 5500 and would enable the DOL to identify plans that

have excessive per participant expenses. It could also be required that this number be included on the statements provided to participants. It could even be estimated as an annual expense as a percentage of total plan assets and included in the other asset based expenses discussed above. Although calculated only once per year, each quarterly statement to a participant could merely show this as "most recent annual administration expense."

Finally, there should be a basic ERISA equivalent of the NASD's rules of fair practice that would penalize vendors and trustees for "materially misleading information" as the NASD does. In my company's previous 401(k) plan provided by the Principal Group, each participant received a quarterly statement of activity. All the expenses were charged against investment earnings (noted by a footnote on a column entitled "*Net Earnings"). Unless I had a loan or withdrawal, the next column titled "Withdrawals/Expenses/Transfers Out" would be zero. These transactions are fairly infrequent and so it clearly is misleading to participants to state that there are consistently zero in expenses. It leaves the impression with the participant they are paying nothing, yet I was personally being charged more than $1,500 a year in expenses that were hidden in my "Net Earnings" between expense ratios and administration fees.

If these things could be accomplished the participants in 401(k) plans could make more informed decisions. While I have seen proposals that attempt to provide the most accurate, to the dollar detailed expense (because there are numerous other expenses not captured in the above like commissions found in the Statement of Additional Information for mutual funds, float on processing time, spreads for risk free and guaranteed accounts, etc.) the burden of detailing these things at this level of detail would be burdensome and perhaps costly. I think the main thing is to stop misleading participants from the notion that they are not paying anything. Leverage existing disclosures that are already provided to trustees to be available instead of hidden from participants to avoid industry lobbying. Then, take the basics of this information and package it in a no cost, easy to understand disclosure.

Sincerely,

David B. Loeper, CIMA, CIMC
CEO - Financeware, Inc.
DBA- Wealthcare Capital Management
www.financeware.com
100 West Franklin Street
Richmond, VA 23220

804-314-2312 (cell)
804-644-4711 X421 (office)
804-644-4759 (fax)
dloeper@wealthcarecapital.com <mailto:dloeper@wealthcarecapital.com>
dloeper@financeware.com <mailto:dloeper@financeware.com>

"Powering the future of financial advice"