



Statement of the U.S. Chamber of Commerce

ON: TESTIMONY ON THE APPROPRIATENESS OF
RETIREMENT PLAN FEES

TO: COMMITTEE ON WAYS & MEANS

BY: HAROLD L. JACKSON

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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.

TESTIMONY BEFORE
THE COMMITTEE ON WAYS AND MEANS
OF THE UNITED STATES HOUSE OF REPRESENTATIVES,
ON BEHALF OF THE U.S. CHAMBER OF COMMERCE
ON
THE APPROPRIATENESS OF RETIREMENT PLAN FEES
BY
HAROLD L. JACKSON
TUESDAY, OCTOBER 30, 2007

Thank you, Chairman Rangel, Ranking Member McCrery, and members of the Committee for the opportunity to appear before you today to discuss the appropriateness of retirement plan fees. My name is Harold Jackson, President and CEO of Buffalo Supply, Inc., a 25-employee, woman-owned small business located in Lafayette, Colorado specializing in the sale and distribution of medical equipment and supplies. 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. The Chamber is the world's largest business federation, representing more than three million businesses and organizations of every size, sector and region. Over ninety-six percent of the Chamber members are small businesses with fewer than 100 employees.

Buffalo Supply, Inc. has been in the medical equipment and supply business since 1983, and we are currently the exclusive source for Stryker, Gaymar Industries and Baxa Corporation products. I joined the company in 1990 at which time company revenues were at \$1.2 million. By building a strong reputation for service with my customers, I have been able to grow our revenues to the current level of \$62 million in 2006.

As President and CEO of Buffalo Supply, Inc., one of my most important duties is to attract and keep highly-qualified employees. It is the employees of Buffalo Supply that carry the banner of our company and maintain the level of customer service that allows us to effectively compete in the marketplace. Therefore, my company offers benefits, including retirement benefits, to attract and retain the best employees. As the operator of a small business, 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 from the perspective of a small business plan sponsor.

INTRODUCTION

According to the U.S. Small Business Administration, small businesses (less than 500 employees) represent 99.9% of the total firms and over 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, we are concerned that fee disclosure requirements could possibly undo all of the positive steps that have been made to encourage small business plan sponsors.

Despite the obstacles, and due to certain 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. We urge Congress to proceed cautiously and give significant consideration to the concerns of small businesses. Creating untenable burdens on small businesses plan sponsors could negatively impact the retirement security of millions of workers.

SMALL BUSINESS PLAN CONCERNS

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

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.

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.

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--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.

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.

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

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

⁵ *Id.*

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.⁶ In other words, the fiduciary has a duty under Employee Retirement Income Security Act 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 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.

Anticipated Liabilities May Drive Small Business Owners Away from Plan Sponsorship. Finally, 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, even though there have not been any findings of abuse, there is a heightened scrutiny of plan fees.⁷ 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 sponsors."⁸ 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

⁶ ERISA section 404(a)(1).

⁷ 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. (UNITED STATES GOVERNMENT ACCOUNTABILITY OFFICE, PRIVATE PENSIONS: *Changes Needed to Provide 401(k) Plan Participants and the Department of Labor Better Information on Fees* 22 (2007)) 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. (Hecker v. Deere & Co., No. 06-C-719-S (W.D. Wis. June 21, 2007)) 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.

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).

and thoroughly consider all implications associated with any future changes or requirements.

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. On July 24, 2007, 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 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 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.”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,

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).

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.

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.

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).

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.¹¹ However, the Chamber believes that guidance is best provided through the Department of Labor (DOL) and Employee Benefits Security Administration (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.

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 will 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.

¹¹ 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 (2006).