BENEFITS EDGE

Employers face pressure on 401(k) plan disclosures

BY MICHELLE CATER RASH THE BUSINESS JOURNAL

There's a new buzzword when it comes to retirement plans — disclosure.

Both the U.S. Department of Labor and Congress are considering new rules requiring more disclosure of the expected returns and associated costs of 401(k) plans.

Scrutiny of 401(k) plans has been increasing for the last several years as the government seeks to ensure that employees have the information they need to make informed decisions and that companies are meeting their fiduciary responsibility, or their legal requirement, to act in the best interest of their employees.

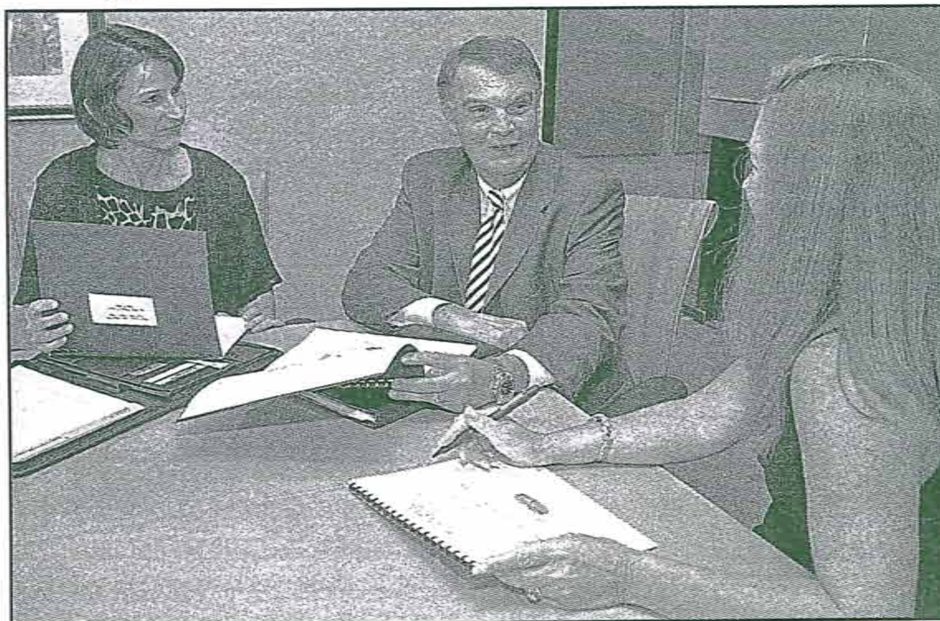
Experts say there was no specific incident or act that triggered this increased scrutiny, which began long before the current recession caused significant drops in the stock market and many employees to lose thousands out of their nest eggs. Instead, it is primarily a natural evolution of the plans as more people entrust their hard-earned money to these funds.

However, the rule changes are perhaps even more important now as companies worry more about the responsibility they bear. The Profit Sharing/401(k) Council of America estimates that more than 7.4 million Americans are enrolled in 401(k) plans. A study by Fidelity Investments found that the average 401(k) plan lost 27 percent of its value in 2008 with the drop in the stock market.

"When investments go poorly, it puts more pressure on employers to do it right and to manage the plan right," says J. Scott Dillon, an attorney who specializes in tax and retirement planning law at Carruthers & Roth in Greensboro. "When the economy is bad, it makes it more likely someone will be disappointed (in their return) and raise a question."

Under section 404(c) of the Employee Retirement Income Security Act (ERISA), companies must meet certain criteria to minimize their legal risk if employees lose money in their 401(k) plans because of personal investment decisions. For example, a company must offer at least three different investment options, each with a different level of financial risk. The company also must let participants switch investment options on a regular basis and give employees enough information to make educated decisions based on plan costs and expected returns on investment.

"It's such an intricate web to differentiate for even an educated plan sponsor (company) to weave his way through... and determine what's best for employees," says Bill Thacker, a principal with Trent Capital Management in Greensboro.



JULIE KNIGHT/THE BUSINESS JOURNAL

William Thacker, director of benefit plan assets at Trent Capital Management in Greensboro, meets with Lorie Best, left, and Chris King of Weaver Cooke Construction.

Other recent changes to the administration of 401(k) plans:

- **Deposit of employee contributions:** In 2008, the U.S. Department of Labor issued new guidelines that in small plans (those with fewer than 100 participants), the participant contributions for the plans must be deposited into the plan trust within seven business days of when the money was withheld from the employee paycheck. This was in response to the audit of several plans showing that companies were holding on to the employee contributions and using that cash to run the business. Then, if the business went bankrupt, the employee accounts were underfunded. The Department of Labor is considering similar rules for larger plans as well.

- **Regular benefit statements:** Plan administrators of 401(k) plans are now required to provide a benefit statement at least once a quarter, no later than 45 days after the end of the quarter for which the statement covers. Statements were previously only required annually.

Fees, fees and more fees

It's the third requirement — making sure employees have the information needed to make educated decisions and weigh the true cost of the plans — that is

PLEASE SEE 401(K), PAGE B11

REPRINT

Trent Capital provides professional 401(k) investment services for all types businesses, acting as an Accredited Investment Fiduciary along side of the Plan Sponsor. Please call today **[336/282-9302]** to discuss how Trent can enhance your firm's 401(k) plan and add to the benefit all employees receive by maximizing their retirement assets.

401(K): *Pros hired to handle retirement funds*

From page B5

leading to the possible new requirements. While some fees are currently required by law to be disclosed, many others, such as marketing fees and fees paid to third-party administrators, are not.

Experts say these fees vary widely from plan to plan, but combined can reduce the return on investment by a few percentage points each year. That can add up to thousands of dollars lost during the lifetime of a 401(k).

Disclosing these fees in a way that is easy for investors to understand will help employees make more educated decisions about which fund is right for them.

The U.S. Department of Labor began discussing greater disclosure of the fees involved in the 401(k) plans, such as transaction fees, several years ago. Under some rule changes that were set to take affect Jan. 1, 2009, employers would have been responsible for giving those enrolled in most 401(k) plans a comprehensive comparative chart outlining all of the fees involved in the various mutual funds. However, the regulations were put on hold for review by the Obama administration and a new timeline has not been released.

Some members of Congress have also suggested new legislation requiring these disclosures, although experts think that with other government priorities it will likely be months if not years before any legislative changes are made.

Under the proposals, ensuring that fees are disclosed would become the responsibility of the employer offering the 401(k) benefit. Experts say until the new rules are finalized, it's hard to know what burden compliance will place on companies, but they expect they would apply to all employers who offer 401(k) plans.

Failure to comply with some of the legislative proposals could result in fines of $1,000 a day per employee enrolled in the retirement plan, up to $1 million.

But some say they are already seeing businesses alter their retirement plans for fear of not following all of the government regulations to the letter and opening the company up to legal responsibility for bad decisions.

Exploring other options

Deb Aboudara, owner of the Retirement Team Inc., a High Point company that manages 401(k) plans for companies, says many companies are getting frustrated with the roughly two dozen standards companies must meet to be protected by section 404(c) in order to minimize their legal risk.

Since companies must comply with section 404(c) only if employees make their own investment decisions, Aboudara says a small but growing number of businesses are hiring professional money managers to invest all of the 401(k) contributions.

For example, Company X may have previously offered its employees five choices of mutual funds in which to invest their 401(k) contributions. However, if company leaders felt the laws were becoming too stringent and too restrictive, they could choose to no longer let employees select their own mutual funds.

Instead, Company X could hire an independent money manager to determine how the contributions should be allocated among the same five funds, or possibly even open it up to more fund options since the person is a professional manager.

This is different than a pension plan because in such a defined benefit plan companies guarantee a specific payout, while in a 401(k) plan losses and gains are constantly incurred and the value of the retirement benefit is unknown. Under this model, employees don't get a say in where their money is invested, but also don't have to spend time researching fund options and worrying if they made the correct choice.

While employers have fewer government regulations to meet, they are not completely absolved of legal risk and need to have written procedures in place to outline how the investment adviser is chosen and how often and under what criteria that decision is evaluated.

While it does relieve companies of some legal obligations, even in this model transparency is important so people know how big their nest egg is and make informed decisions, Retirement Team's Aboudara says.

Reach **MICHELLE CATER RASH** *at (336) 370-2918 or mrash@bizjournals.com.*

What happens to a 401(k) plan when a company goes bankrupt?

The assets in a 401(k) plan are held in a trust. If the company providing the plan to its employees goes out of business, the plan is "orphaned" and placed under the care of a trustee. The trustee is responsible for contacting all participants to make arrangements to remove the money from the trust. The plan participant can either roll his or her holdings into another 401(k) plan, place them in an Individual Retirement Account or take them as cash, although in most cases a cash withdrawal would be taxed while the other options would not. If an employer has gone out of business and employees cannot reach the trustee, they should contact the U.S. Department of Labor (www.dol.gov), which will help them access their assets.