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## 401(k) lawsuits may pose legal risk for advisers

By **Lisa Shidler**

November 20, 2006

CHICAGO - A recent spate of lawsuits - filed against some of the nation's biggest employers - alleging that certain revenue-sharing agreements with 401(k) providers were illegal has some advisers worried that they also may find themselves in the cross hairs.

The employee lawsuits, which were filed in September against such companies as Boeing Co. and Lockheed Martin Corp. have brought increased scrutiny on fees charged by 401(k) plans.

For now, those on the hot seat are primarily big companies. But future suits, industry experts say, likely will include financial advisers, fund

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companies and others involved in setting up and  
- Advertisement - administering 401(k) retirement plans.

"I think everyone's paying attention to these lawsuits," said attorney Fred Reish, managing director of the law firm Reish Luftman Reicher & Cohen in Los Angeles

"Everyone's been beating the drum about fees related to 401(k) fees," he said. "This is one more beat to the very same drum."

By often failing to disclose their own compensation, advisers have made it look as though they have something to hide, Mr. Reish said.

"The American way of thinking is, if you're hiding something from me, it must be bad," he said.

Advisers "should be concerned, and yes, they should be paying attention," Mr. Reish added.

**Keeping eye on outcome**

Many advisers, in fact, are paying close attention.

"The advisers will be named in these suits if they're acting as the fiduciary," said John Hefele, a registered investment adviser with St. Louis-based Fiduciary Advisors Inc., which does 90% of its business with plans that have no more than \$25 million in assets. "The typical broker doesn't acknowledge fiduciary status, and that will have to change."

Although Fiduciary Advisors began disclosing more information about fees eight years ago, not all advisers have been as forthright, Mr. Hefele said.

A big part of the problem is that the Chicago-based Profit Sharing/401(k) Council of America, which represents 1,200 employers and 6 million plan participants, for years has virtually ignored concerns about lack of transparency involving 401(k) fees, he said.

"The much bigger issue was that David Wray ignored this issue and kept his head in the sand for years," Mr. Hefele said of the trade group's long-standing president.

Mr. Wray declined to comment on Mr. Hefele's accusation. "I will not dignify that comment with a response," the former said.

In fact, the momentum to shine more light on 401(k) fees has been building for years, Mr. Wray said.

As a result, advisers are doing a better job disclosing fees to their clients.

"These advisers are disclosing their fees," Mr. Wray said. "The fees are sort of general, but they didn't do it five years ago, and today they are."

That said, there is always room for improvement, said Mr. Wray, who does not believe that most advisers have to worry about getting caught up in the suits between employees and their bosses.

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Not everyone agrees, however.

**The floodgates are open**

"Advisers will get chucked in," said Matt Gnabasik, a registered investment adviser with Chicago-based Blue Prairie Group LLC, a fee-based consulting firm. "If you're a plaintiff's attorney, your motivation is deep pockets. The floodgates have already started to open. The water is spilling off the top."

Because many advisers don't have that kind of wealth, Mr. Gnabasik feels that some larger fund companies might be faced with these suits first. But advisers easily could get thrown in the mix, he said, because many of them haven't made the necessary changes.

"There's still garbage product out there," Mr. Gnabasik said. "You still have bad brokers making outrageous commissions."

Samuel Johnson, an adviser with Johnson Sterling Paul & Co. Inc. in Birmingham, Ala., isn't too worried about himself.

"Our fees aren't tied to any transactions that would resemble in any way commissions or sales charges," he said. "We've fully embraced this and think it is long overdue and a very good idea."

Even so, since the lawsuits, Johnson Sterling Paul has begun reviewing the 401(k) plans it advises more carefully and with greater frequency.

Mr. Johnson is, however, worried about other advisers.

"We believe that advisers are fiduciaries and, as such, are held to the same standards as plan sponsors or any other fiduciary," he said.

It's still too early to know what will happen from these lawsuits, said Rick Meigs, president and founder of 401khelpcenter.com LLC in Portland, Ore.

But he also believes that these lawsuits most certainly will cause more scrutiny from regulators.

"It all gets down to the money," Mr. Meigs said. "Did that adviser really recommend that fund because he thought it was in the best interest, or did he recommend it because he knew it would generate a better income for himself?"



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