Fee Information Has Been Delivered—Now What?

The aftermath of 408(b)(2)

PLAN-LEVEL disclosures required under Employee Retirement Income Security Act (ERISA) Section 408(b)(2) became effective July 1, 2012, requiring that retirement plan service providers, affiliates and subcontractors must disclose their compensation to plan sponsors. These hard- and soft-dollar disclosures must be made reasonably in advance of entering into a contract for services, with updates necessary when a contract is renewed or extended or when fee information changes. This requirement is designed to enable plan sponsors to meet their fiduciary duty to manage plan fees and to ensure that sponsors understand any indirect or "hidden" compensation of providers. The new rule applies to service providers that reasonably expect to receive $1,000 or more in compensation—direct or indirect—for providing plan services to a covered plan.

What to Do With Disclosures

Plan sponsors have a duty to ensure that a plan's fees and expenses are reasonable, as part of their general fiduciary duty under ERISA. Moreover, ERISA's prohibited transaction rules allow plan assets to be used to pay a service provider only if the service arrangement and fees are reasonable. To protect themselves against potential fiduciary liability, plan sponsors should conduct a fiduciary review of all plan fees and investment expenses as soon as practicable, if they have not done so already.

The plan-level fee disclosures are an ideal starting point for such a review. A well-documented review of the reasonableness of these fees and expenses helps demonstrate that the plan sponsor has prudently fulfilled its fiduciary duties under ERISA. Plan sponsors should never misinterpret this duty to mean selecting the least expensive investment or provider. As part of a prudent review, advisers should:

• **Gather information regarding each provider, its services and fees.** This information should include the provider's qualifications; the scope and quality of the services; and the reasonableness of fees in relation to the services.

• **Consider indirect compensation when evaluating investments and services.** To ensure a comprehensive evaluation, plan fiduciaries should identify the provider's direct compensation and any indirect compensation payable by the plan's investments or investment providers. In the case of an administrative service provider receiving payments from investment funds or investment providers, once the provider's full compensation has been identified, fiduciaries should separately evaluate the investment and administrative service components of the plan's arrangement. If the plan's providers participate in any type of indirect compensation arrangement, the true allocable cost for investments and administrative services, respectively, should be determined in order to evaluate separately the reasonableness of the investment fees and the administrative service fees.

• **Solicit bids when selecting or reviewing providers.** When selecting a new provider, consider obtaining relevant information from multiple providers. If a provider utilizes one or more subcontractors, their information should also be requested and reviewed. When performing a routine review of an existing service provider, the sponsor may request updated information concerning its qualifications; assess the provider's historical performance, taking into account feedback from participants and other relevant parties; and gather pricing information concerning prevailing rates for similar services for a similarly sized plan. Financial advisers can be helpful for gathering pricing information or for accessing benchmarking services.

• **Evaluate fee information in relation to services provided.** Plan fiduciaries should resist selecting or changing providers based on fee information alone. They should also take into account the scope and quality of the services, as well as the qualifications of the provider, in order to determine whether the fees are reasonable for the services provided.

• **Conduct fiduciary reviews regularly with supporting documentation.** Reviews should be performed at reasonable intervals—e.g., annually—and should be documented with minutes that include a summary of the information gathered and the areas of fiduciary review. In other words, this should not be a "one and done" exercise occasioned by receipt of the initial plan-level disclosures.

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