

A Plan Sponsor's Guide to Handling Retirement Plan Fee Disclosure

By Ary Rosenbaum, Esq.

In the Old Testament, on the first day there was light and that started the creation of the world. On April 1, 2012, the world of retirement plans finally leaves the world of darkness and embarks on a new world of light when fee disclosure regulations become effective. Unless there is an 11th hour delay, these regulations will cause a fundamental change to the industry and in the nature of how plan sponsors implement and maintain their retirement plans. The only problem is that most plan sponsors don't understand what fee disclosure will mean to them especially when it comes to the added responsibility it will entail. So this article is designed to help plan sponsors like you understand the new fee disclosure regulations and how to deal with it.

Understanding Fee Disclosure

Up until now, there was no requirement that a service provider fully reveal all fees they collect working on a retirement plan (whether they are paid directly by the plan sponsor or the plan or indirectly by someone else). The problem is that plan sponsors have a fiduciary duty to determine whether the fee for running the plan are reasonable, which is difficult if plan providers aren't so forthcoming in what fees they are receiving.

The plan sponsor fee disclosure or what is known as the Section 408(b)(2) regulation (so named for the regulation issued by the Department of Labor (DOL) under ERISA Section 408(b)(2)) requires you (as plan sponsor) to collect fee informa-

tion from "covered service providers" that receive \$1,000 or more from the plan for services. This regulation (unless extended at the 11th hour by the DOL) will go into effect on April 1, 2012. Plan providers include ERISA fiduciaries and investment advisors, providers of recordkeeping and brokerage services allowing participant direction of investments, and providers of specific plan services (e.g., auditing, legal,

are covered by ERISA and have the investments directed by the participants. You provide disclosure of plan investment-related information, including fees and expenses. This regulation will go into effect on June 1, 2012 (unless further delayed by the DOL).

The failure to comply with the plan sponsor fee disclosure will be that the plan sponsor may be held to be partaking in a prohibited transaction by the DOL which will lead to an excise tax of 15% of the service provider contract in question which can increase over time to 100% for further non-compliance. Failure to comply with the plan participant fee disclosures may not result in penalties, but will probably mean a loss of liability protection under ERISA §404(c) for participant directed investments as well as possible damages in litigation by the DOL and/or plan participants.

Determine your service providers

As a plan sponsor, it is necessary to make sure that your service providers comply with these regulations

and the first step is to determine who your providers are. While that should be simple enough, there are many situations where you may not be sure who your providers are. This may be because you may have an unbundled provider situation where they may be a number of different providers providing different services such as administration, processing, investment and legal advice. So you need to delineate the providers who provide the services to your plan and confirm what those services are.

consulting) expecting to receive direct or indirect payment from related parties. This regulation applies to plans that are covered under ERISA and requires an initial fee disclosure notice and a regular communication regarding plan fees.

The participant fee disclosure or what is known as the Section 404(a)(5) regulation (so named for the pertinent section of ERISA) requires the you to provide information to participants for plans that



You will also need to confirm the details of the fee arrangements with these providers, the nature of the provider relationship to the plan, and whether there are any conflicts of interest that the provider may have. In addition to determining your providers, you should also determine who is the contact person at each provider that will maintain and distribute the disclosure information. In addition, find out whether they will help you prepare the information for the 404(a)(5) participant disclosures because if they won't, you will have to find someone who will. Consider getting new providers in that case since providers should help prepare the bulk of the participant disclosures.

Review the disclosure

It should be noted that there is no specific format for the plan sponsor disclosure from your service provider. Some of your providers may supply you with a document that is similar to a service agreement, which lists each service they provide. Other providers might include a breakdown of services in the body of an annual written report that they will present to you. Still others might reference different plan agreements or contracts that describe the services delivered, though it may not be in one document. So don't get caught up by the different formats you may see, be more concerned that the information you receive is correct and in time.

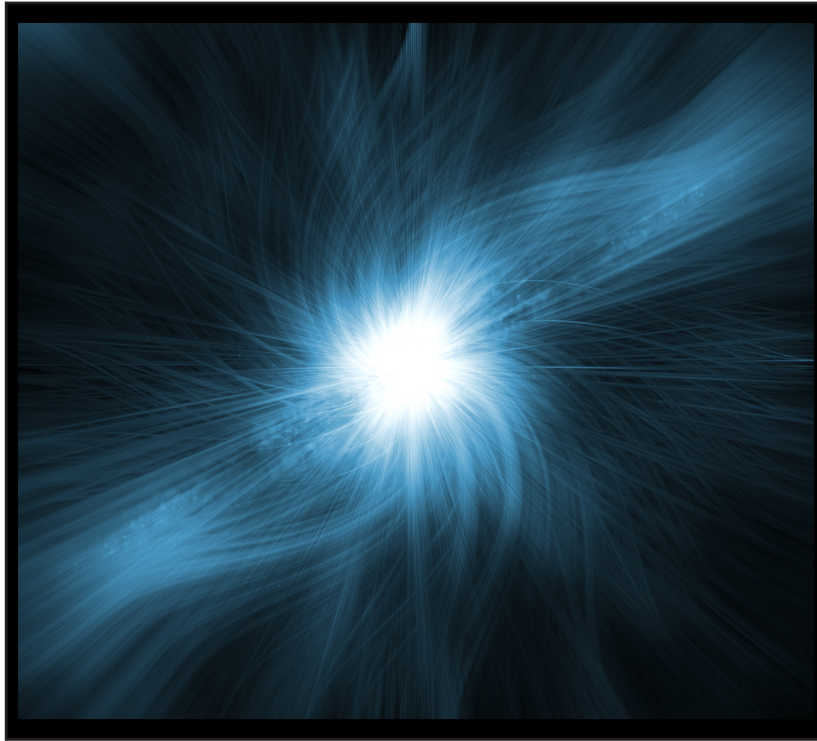
Be updated on fee changes

The release of the fee disclosure isn't enough. Each of your providers must distribute to you a notification of any change to their fees. This might occur because of a rise in cost of providing services or simply if an investment option in the fund lineup was replaced (which might change the plan's fee structure). The provider is required to notify you of this change in writing within 60 days from the date that the provider becomes aware of these changes.

Shop around your disclosure

Too many plan sponsors think that the

fee disclosure is just a form they need to put in the back in the drawer. It doesn't, it actually adds greater weight to your fiduciary responsibility. As plan fiduciaries, you are required to evaluate whether the fees you pay are reasonable given for the services provided as well as to assess



whether there is potential for a conflict of interest. In order to determine if there is a possible conflict, you should request information regarding revenue-sharing arrangements the provider might have with fund providers and follow up with questions or concerns.

After a review of the fees and related services, if you believe that the value you received is consistent with the fees that the plan paid, then you should document and memorialize your review and approval of the plan fees for the providers' services. If you don't believe that the plan fees are fair for the services delivered, then you should negotiate with your current providers to improve fees and/or service or seek out a new provider.

Follow up if you don't get them

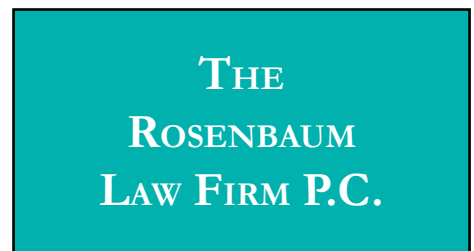
For the 408(b)(2) plan sponsor disclosures, simply blaming a service provider for not providing the fee disclosure on time isn't enough. If you do not follow up to make sure that you received the required fee disclosure, you will be at fault.

If a provider fails or refuses to comply with its disclosure obligations, you are required to make a written request to the service provider for them. If after your written request, the provider still fails to provide the required disclosure, then the DOL regulation requires that 30 days following the earlier of: the date of the provider's refusal to furnish the requested information, or the date which is 90 days after the date of your written request to the service provider, you must file a "Delinquent Service Provider Disclosure" with the DOL reporting the service provider's failure or refusal to provide the requested information in order to avoid a penalty.

Under the 404(a)(5) participant disclosures, the plan sponsor has no method of protection like there is with the plan sponsor disclosures because ultimately you are fully on the hook for the participant disclosures.

Conclusion

Fee disclosure will be a breath of fresh air to the retirement plan industry, but it will come at a cost to plan sponsors in added work and responsibility. Hopefully, this article will help you get prepared for the coming storm.



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