

What Retirement Plan Sponsors Need To Do About The New Fee Disclosure Regulations

By Ary Rosenbaum, Esq.

I occasionally joke that the retirement plan industry is the last legal racket left. It is an industry that regulates behavior that could be considered illegal in other industries. What is considered revenue sharing payments that some mutual funds funnel to third party administration (TPA) firms to defray the administrative costs of 401(k) plans that used those funds could be considered in another industry an illegal kickback, a bribe, or was considered payola in the music industry. It is one of the few industries where professional service providers weren't legally required to inform their clients of how much they were receiving in fees. The problem is that while retirement plan providers weren't legally required to tell plan sponsors how much money they were reaping in fees, it was the plan sponsor's fiduciary duty to make sure that they were only paying reasonable plan expenses, which is impossible if they couldn't determine how much they were paying, especially when some providers were perpetuating the myth of free plan administration.

With fee disclosure regulations to be finally implemented by the Department of Labor in 2012 (at press time, April 1, 2012), plan sponsors will finally get a disclosure of all fees that their retirement plan providers received directly or indirectly. While fee disclosure regulations have been on the mind of retirement plan providers such as TPAs, financial advisors, insurance companies, mutual fund companies, and ERISA attorneys for years, no one has bothered to tell plan sponsors what fee disclosure will mean to them. Retirement plan fee disclosure under the 408(b)(2) regulations isn't just about the revealing of the retail price for plan administration like Drew Carey does on the Price is Right,

plan sponsors will have important duties under the regulations to fulfill. By neglecting these duties, plan sponsors could face penalties and sanction from the DOL, as well as increased liability from litigation by plan participants. As with most things in the retirement plan industry, plan sponsors are the last to know what their duties and potential liability are. Hopefully, this article will help plan sponsors understand fee disclosure and what they need to do about it in order to minimize their liability

establishment or operation of the plan, and no more than reasonable compensation is paid for the services. Therefore, the plan sponsor and the other plan fiduciaries will need to make sure everything is done correctly by their retirement plan providers to abide by these new regulations or run the risk of being penalized for conducting a prohibited transaction.

What is fee disclosure for retirement plans? Certain retirement plan providers who have a direct contract with a retirement plan and expect to receive \$1,000 or more in fees (directly or indirectly) must provide disclosure to the plan sponsor and the other plan fiduciaries. The retirement plan providers subject to fee disclosure are: fiduciaries, plan asset managers, financial advisers, platform providers, (providers of brokerage or recordkeeping services to participant-directed Plans such as a TPA); and other service providers who expect to receive indirect or related party compensation such as accountants and attorneys.



as plan fiduciaries.

Why are the fee disclosure regulations such a big deal? ERISA already prohibits the furnishing of goods, services or facilities between a plan and a party in interest to the plan. Since a "party in interest" includes any retirement plan provider, service contracts would be prohibited unless they qualify for an exemption. The Section 408(b)(2) regulations (as the fee disclosure regulations are called) provides such an exemption by permitting plans to arrange for a party in interest to provide services if the contract or arrangement is reasonable, the services are necessary for the

These retirement plan providers will have disclose the following information: a description of services provided to the plan; a description of compensation they expect to receive; compensation they will receive at termination of their contract with the plan; as well as the manner of payment (such as whether the plan will be billed or whether fees will be deducted from plan accounts).

The retirement plan providers will have to make the disclosures in advance of the date on which the contract or arrangement is first entered into. Disclosure must also be provided again when the contract is

extended or renewed. All retirement plan providers should consider revising their contracts to comply with the fee disclosure regulations and will most likely contact the plan sponsor to sign the revised agreements, which should be around the time that current plan providers will make that disclosure after the regulation's effective date. If any change is made to the information required to be disclosed by the retirement plan provider, the provider must report such change to the plan sponsor as soon as practicable, but generally not later than 60 days after the retirement plan provider is informed of the change. Any reasonable good faith disclosure errors made by the a retirement plan provider will not cause the contract or arrangement to be unreasonable with respect to the regulations (and hence will not be treated as a prohibited transaction), provided they are corrected as soon as practicable, and not later than 30 days from the date on which the provider knows of the error.

Plan sponsors need to make sure that their plan providers provide the fee disclosure because if they don't get it, then their arrangements with these providers maybe considered a prohibited transaction. While a violation of the fee disclosure rules may result in a prohibited transaction for the plan sponsor that violates ERISA, the regulation does provide an exemption, in certain cases, for such a violation, provided each of the following four criteria are satisfied: the plan sponsor did not know that the retirement plan provider failed or would fail to make required disclosures and reasonably believed that provider disclosed the required information; the plan sponsor, upon discovering that the provider failed to disclose the required information, requests in writing that the provider furnish such information; If the provider fails to comply with such written request within 90 days of the request, the responsible plan fiduciary files a notice regarding such failure with the DOL. The problem with this exemption is that most plan sponsors will have no idea whether their providers will comply and since many plan sponsors rely on their plan providers for almost everything, they will have no idea that they will need to contact them for the disclosure, and what further steps they will have to take to avoid a prohibited transaction.

In addition, even if their retirement plan

providers abide by every iota of the fee disclosure regulations, the plan sponsors and the other fiduciaries are not off the hook. Plan sponsors will still need to determine whether the fees that they pay for services are reasonable and the only way that they can do that is to shop the plan around to other service providers to gauge whether they are paying too much. The regulations don't require plan sponsors to seek the cheapest providers, but just to pay reasonable plan expenses. It reminds me of this contractor I used on my house named Frank. Frank was a nice fellow and my wife and I had a certain trust in



him. Frank renovated our kitchen and the downstairs portion of our high ranch house. When we needed some drywall work done downstairs (because of a mold remediation and installation of a French drain), Frank came in with an estimate that I thought was way too high. For the first time, I shopped around Frank's estimate and he was higher by about \$5,000. I no longer use Frank and the only reason why is because I shopped around to determine whether his fees were reasonable. Had I not, I would have overpaid. Plan sponsors don't get off that lightly by overpaying, they run the risk of being considered as partaking in a prohibited transaction and they run the risk of being sued by plan participants for a breach of fiduciary duty because paying reasonable plan expenses is an important fiduciary duty that a plan sponsor and fiduciary have to exercise prudently. A plan sponsor will have to do quite a bit of extra work in making sure that the fee disclosure regulation are abided by, but here is a simple list to get ready.

What Plan Sponsors need to do to get ready for the Fee Disclosure regulations:

1. Identify their plan providers.
2. Identify their plan fiduciaries.
3. Contact their plan providers to determine how they will be abiding with the fee disclosure regulations and when they

should expect the disclosure and new service agreements (if the current ones don't abide).

4. Make sure that their plan providers comply with the disclosure regulations.

5. Determine whether the fee disclosures that they received from them actually abide with what is required with the regulations.

6. Retain the fee disclosure to ensure continued compliance by their retirement plan providers.

7. Contact the DOL if a retirement plan provider doesn't comply with the disclosure requirements.

8. Implement a process to review retirement plan providers annually to determine their competence.

9. Shop the plan to competing retirement plan providers every 1-3 years to determine whether the fees they are paying is reasonable in light of the services they received.

10. Hire an ERISA attorney or independent retirement plan consultant to assist in this entire fee disclosure process.

Fee disclosure will be a positive development for the retirement plan industry and for plan sponsors as they will finally know the entire cost of administering their plan. This development should defray a plan sponsor's liability by knowing the true cost of administration, but only if the plan sponsor completes their added responsibilities in complying with these new regulations. As with many thing in life, you have to give something to get something.

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