# Why Retirement Plan Sponsors Shouldn't Only Focus on Low Fees

## By Ary Rosenbaum, Esq.

In our free market economy, there are different companies with their own niche and marketplace whether it's a manufacturer, retailer, or a professional service provider. Some companies cater to the higher end of the market and some cater to the low end. The free market is strong enough to support companies at different ends of the marketplace like Brooks Brothers and Wal-Mart for men's clothing.

When it comes to the retirement plan marketplace, there are financial advisors, third party administration (TPA) firms, accounting firms, and ERISA attorneys that cater to different sectors of the market. The TPA handling the retirement plan for a Fortune 500 company isn't going to be the same TPA for a plan with $200,000 in assets. The financial advisor that handles the retirement plan for a $100 million plan isn't going to be the same financial advisor handling a $100,000 plan. There are providers of all sizes and all sorts; it's just a question of finding the providers that are the right fit for you if you are a retirement plan sponsor.

With fee disclosure regulations being implemented in 2012, retirement plan providers will have to divulge to their retirement plan sponsor clients the direct and indirect compensation that they receive for the services they will provide. The administration expenses of running a retirement plan (especially daily valued 401(k) plans) were usually cloaked with hidden fees and hidden reimbursement arrangements from mutual fund companies that led many retirement plan sponsors to believe that they were getting their services for a lot less than what was in reality or that they were getting it for free. To quote the great, former Governor of New York, Hugh Carey, "The days of wine and roses are over."

When we purchase personal items and we overpay, we may get a little angry that we spent more than we should have. When it comes to retirement plan sponsors, overpaying for plan administration can be a breach of fiduciary duty because for most 401(k) plans, the plan participants are paying the administration expenses of running the plan. Retirement plan sponsors have fiduciary responsibilities which include carrying out their duties prudently and paying only reasonable plan expenses.

So while plan sponsors will get the disclosure of the fees they are paying their retirement plan providers, simply putting those disclosure forms in the back of the drawer won't suffice. Retirement plan sponsors will have a fiduciary duty to institute a process of determining whether those fees are reasonable and the only way to do that is to shop the plan around to other providers and determine whether the fees they are paying are in line with what is out there in the marketplace. So while high fees have been a concern for many retirement plan sponsors, many cynics in the retirement plan business indicate that with fee disclosure, plan sponsors will move their retirement plan providers to only low-cost financial advisors and TPAs. While I disagree with that view, retirement plan sponsors should understand that picking retirement plan providers should be based on a number of factors such as the amount of fees being charged as well as the breadth of services that the provider is offering.

While paying unreasonable plan expenses is a breach of fiduciary duty, picking providers solely or mainly because they are low in fees can also breach the fiduciary duty. Retirement plan sponsors also have a duty of prudence as a one of their fiduciary duties. Prudence is about the process for making fiduciary decisions. Prudence requires the plan fiduciaries to document decisions and the basis for those decisions. Since most plan sponsors don't have the background to administer their retirement plan and make investments on their own, they need to hire the expert plan providers that can. So in hiring any plan provider, a fiduciary should survey a number of potential providers. By doing so, a fiduciary can document the process and make a meaningful comparison and selection. The duty of prudence requires the selection of competent plan providers and selecting an incompetent provider is a certain breach of that duty. So a plan provider needs to select competent plan providers that charge reasonable expenses.


Governmental contracts are typically decided by the lowest bidder. Sometimes it works, lots of times it doesn't. The same thing goes with selecting plan providers. There are many low cost providers out there and some do a very good job and some do not. Some low cost TPAs may be good if there is limited amount of work on a 401(k) plan that has a safe harbor design and terrible if the plan requires a discrimination test.

Paying only reasonable expenses is not the same as paying low expenses. Plan provider expenses aren't important as the quality of service. A financial advisor charging 15 basis points providing no help in the fiduciary process such as developing an investment policy statement, reviewing investment options, and educating participants in a participant directed 401(k) plan is less reasonable than paying another advisor 50 basis points to serve as an ERISA §3(38) fiduciary. Why? The advisor charging 15 basis points is actually increasing the plan sponsor's liability as a fiduciary because they are doing nothing while the ERISA §3(38) fiduciary is assuming almost all of that liability. Reasonableness is not about cost, it's about the value of the services provided. A TPA that can help develop a plan design that maximizes contributions for highly compensated employees through a safe harbor/new comparability or a cash balance design is a better value than a TPA who only knows a 401(k) plan with a comp to comp allocation that leaves employer money on the table because it fails to maximize contributions to highly compensated employees.

With fee disclosure regulations, plan sponsors will now have no choice but to annually review their plan providers and shop the plan around to determine whether the fees they are currently being charged are reasonable. When shopping or doing price comparisons, plan sponsors should be aware of what their plan providers provide and only consider providers who could perform around that same level and breadth of service. Plan sponsors need to focus on the competency of plan providers, the services they offer, and the value they provide. Concentrating just on how much a provider charges may cost more in the long run if that provider provides services that are incompetent. I have seen too many plan sponsors forced into the Internal Revenue Service (IRS) or Department of Labor (DOL) correction programs to fix the errors of plan providers that were picked solely on cost. This is not to suggest that low cost providers are incompetent, it just means that the selection of a plan provider requires a careful process of evaluating them to find the best fit.

So when shopping the retirement plan when they received fee disclosures from their current providers or if they are in the market for a new provider, retirement plan sponsors should focus on fees, but also focus on the quality of the plan providers that are in consideration because selecting the wrong provider can lead to huge expenses for plan correction (which may or may not require IRS and/or DOL oversight) or possible litigation by participants alleging a breach of fiduciary duty. The buck stops with the retirement plan sponsor, so it's in their interest in selecting the right providers, not just the cheapest providers.

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