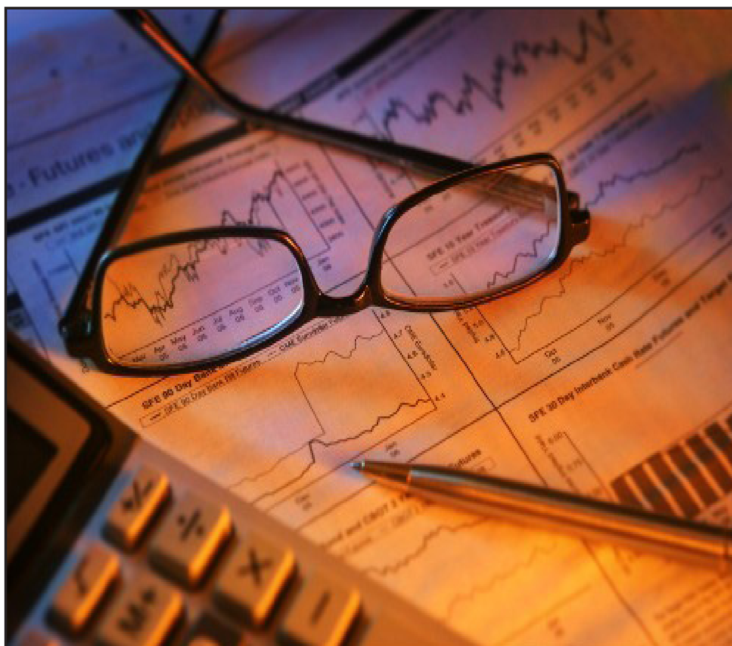
10 Major Misconceptions Retirement Plan Sponsors Have About the Fee Disclosure Regulations

By Ary Rosenbaum, Esq.

In 2012, the role of a retirement plan sponsor will change forever. The plan sponsor fee disclosure known as the Section 408(b)(2) regulation requires a plan sponsor to collect fee information from "covered service providers" that receive $1,000 or more from the plan for services. This regulation will go into effect on July 1, 2012.

The participant fee disclosure or what is known as the Section 404(a)(5) regulation requires plan sponsors to provide information to participants for plans that are covered by ERISA and have the investments directed by the participants. This regulation will go into effect on September 1, 2012. The problem is that most plan sponsors don't understand their responsibilities when it comes to both regulations because they have misconceptions of what the regulations really mean and their role in following them. This article's intent is to debunk the misconceptions plan sponsors have about both sets of fee disclosure regulations.



10. Plan sponsors aren't responsible if their providers don't provide the necessary disclosures.

The failure to comply with the plan sponsor fee disclosure will be that the plan sponsor may be held to have partaken 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.

9. Plan sponsors don't have to do anything if their providers don't provide the necessary disclosures.

For the plan sponsor disclosures, simply blaming a service provider for not providing the fee disclosure on time isn't enough. The plan sponsor has to follow up to make sure that they received the required fee disclosure or they will be at fault. If a provider fails or refuses to comply with its disclosure obligations, they are required to make a written request to the service provider for them. If after their 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 their 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. In addition, the final regulations require the plan sponsor to fire the provider who fails to provide the necessary disclosures.

8. If the plan providers are great, plan sponsors don't have to review the disclosures.

Most plan sponsors are happy with their provider and will never consider a change. The problem is that many plan sponsors really aren't knowledgeable enough to determine whether their providers are actually great and competent. As plan fiduciaries, plan sponsors are required to evaluate their providers for competence and cost. A plan sponsor should consult with a retirement plan consultant and/or ERISA attorney to determine whether their provider is doing their job effectively at a reasonable cost because as a plan fiduciary, the plan sponsor is liable for the incompetence and outrageous cost of the providers they hire.

7. If their plan is using an insurance company provider, their plan is too expensive.

While many advisors and TPAs do a lot of great marketing about plan costs and fiduciary responsibility, some go a little overboard. While using an insurance company provider can be expensive, the fact a plan sponsor is using one doesn't guarantee that they are paying too much in fees. Each plan must stand on its own and its fees should be reviewed. Insurance companies have pricing levels for plans of all sizes, so there are plans out there using insurance company providers who are paying fees that are quite reasonable.

6. It's OK to use the most expensive

provider.

When it comes to the retirement plan industry these days, 50% of the conversation is about plan expenses. Plan sponsors need to pay only reasonable plan expenses to their providers. Otherwise, it's a breach of their fiduciary duty. Reasonableness is open to interpretation, but it's all about paying a fair price for a fair service and the way to determine reasonableness is to check what other provider charge. Using the most expensive provider doesn't guarantee the best level of service since there has never been a correlation between price and quality of service when it comes to plan services. Picking just the most expensive option can be a mistake, ask the folks who bought a Cadillac Cimarron and discovered it really was a Chevrolet Cavalier with a Cadillac nameplate.

5. It's OK to use the cheapest provider.

The discussion about fee disclosure regulations is about making sure that the administrative expenses of a retirement plan shouldn't be excessive. On the flipside, choosing a retirement plan provider just because they are the least expensive provider is a mistake. Hiring a service provider in and of itself is a fiduciary function. When considering prospective service providers, plan sponsors need to make sure of the capabilities of the service provider as well as the needs of the plan. Picking a plan provider just based on the lowest advertised fee is a fool's bargain because many times, the cheapest provider is the most incompetent provider. Low fees should be a consideration, but not the sole consideration because as they say, you get what you pay for.

4. The plan providers are responsible for the participant disclosures.

While there is protection for plan sponsors if their providers don't provide the plan sponsor fee disclosures, there is no similar protection on the plan participant disclosure side. The reason? It's ultimately the plan sponsor's responsibility to get it done because unlike the plan sponsor disclosures, the plan sponsors are required to provide the disclosures to participants. While plan sponsors need to rely on their plan provider to help them complete the disclosures, it should be remembered that whether their providers help or not (fire them if they don't), it's the plan sponsor's responsibility to get it done.

3. If the Plan is small, who is really going to bother the Plan Sponsor about participant disclosures?

There is a misconception out there is that no one wants to bother with small Plans because there are bigger fish (Plan with more assets) to fry. However, the fact is that smaller plans will more likely have more fee disclosure compliance issues than larger plans. With a vigilant DOL and hungry litigating attorneys, why should any plan sponsor take the risk by being non-compliant?

2. Plan providers should assume the fee disclosure by their providers will be correct.

If I have ever learned anything in the retirement plan business, it's this: never assume anything. Plan sponsors should be aware that there is no specific format for the plan sponsor disclosure from their service provider. Some may supply 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. Still others might reference different plan agreements or contracts that describe the services delivered, though it may not be in one document. So plan sponsors shouldn't get caught up by the different formats they see, but should be more concerned that the information they receive is correct and in time. In addition, each provider must distribute 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 the plan sponsor of any changes. So if a plan sponsor is aware of these changes, they should make sure they also get the written notice of these changes.

1. Plan sponsors just have to put their fee disclosure away and do nothing.

Too many plan sponsors think that the fee disclosure form they get from their provider is just a form they need to put in the back in the drawer. It doesn't, it actually adds greater weight to their fiduciary responsibility. As plan fiduciaries, they are required to evaluate whether the fees they pay are reasonable for the services provided as well as to assess whether there is potential for a conflict of interest from their provider. After a review of the fees and related services, if the plan sponsor believes that the value they received is consistent with the fees that the plan paid, then they should document and memorialize their review and approval of the plan fees for their providers' services. If they don't believe that the plan fees are fair for the services delivered, they should negotiate with their current providers to improve fees and/or service or seek out a new provider.

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