How Retirement Plan Sponsors Can Avoid Turning 2012 Into Their Apocalypse

By Ary Rosenbaum, Esq.

2012 according to Mayan legend is supposed to be the end of the world; at least what that dreadful John Cusack movie told me. Perhaps Mayans were mistaken about this great apocalypse and that the apocalypse entails the dramatic changes to the retirement plan industry because if plan sponsors are unaware of their role in this year of change, something cataclysmic could happen to them such as a participant lawsuit or sanction from the Department of Labor. So this article is intended to serve as a guide for plan sponsors on how to survive 2012 and beyond as this year places added burdens and responsibilities to plan sponsors.

The Section 408(b)(2) Regulations

In the "good old days" or the days prior to July 1, 2012, plan sponsors as fiduciaries were caught in a Catch 22. As fiduciaries, plan sponsors had the responsibility to pay only reasonable plan expenses even though those providers didn't have to tell them exactly how much direct and indirect compensation they were receiving. So when a plan provider was telling a plan sponsor that they charged nothing for the plan's administration, so many plan sponsors were unaware that the provider was making a killing in wrap fees where they took ordinary mutual funds and layering it with added expenses to compensate them for the investment and administration sides.

Thanks to much complaints throughout the industry and the renewed pro-plan participant approach by the Department of Labor (DOL) and inaction by Congress, the DOL implemented fee disclosure regulations under Section 408(b)(2) and Section 404(a)(5) of ERISA that are known as the fee disclosure regulations. The Section 408(b)(2) regulation deals with disclosures to plan sponsors that service provider must abide by and provide annually. This includes the plan provider acknowledging any fiduciary role they may be taking, as well as disclosing what fees that they are paid directly or indirectly (by a mutual fund company, for example) for the work they are doing on the plan. Thanks to the delay in the DOL drafting final rules regarding these regulations and the industry's complaints that providers weren't ready, the regulations were not going into effect until July 1, 2012.

Too many plan sponsors assume that the fee disclosure regulation puts all the burden of compliance on the plan providers and all they have to do is receive the disclosure. The problem is that plan sponsors have a fiduciary responsibility to make sure their plan providers comply and if they don't, they have to fire the plan providers and they r risk having the DOL consider the arrangement with the plan provider to be a prohibited transaction, which will result in penalties to the plan sponsor. In addition, plan sponsors have to get that disclosure from their plan providers and determine whether these fees they are paying these plan providers are reasonable. So simply putting these disclosures in a file folder isn't enough, the plan sponsors have homework with these forms which may be benchmarking fees through a service or seeking proposals from competing plan providers. Plan sponsors have a fiduciary duty to make sure the plan expenses are reasonable for the services provided and with fee disclosure, there is no excuse to not get it done. However, while fees have to be reasonable, they don't have to be the least expensive. Plan sponsors do a disservice to themselves by confusing cost and quality because often, the least expensive provider offers the service least in quality which subjects the plan to greater harm and expenses (by hiring a competent provider to clean up the mess).

The Section 404(a)(5) regulations

60 days after the implementation of the Section 408(b)(2) regulations, the plan participant disclosure regulation known as the Section 404(a)(5) regulation go into effect. This regulation is applicable only to plans where the participants direct their own investment, so a trustee directed plan such as a defined benefit plan or balance forward/pooled 401(k) plan aren't required

to provide them to plan participants.

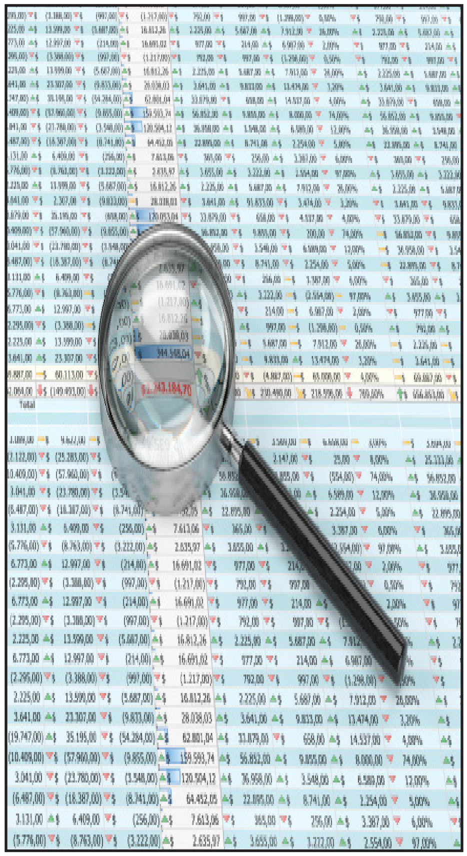
The new plan participant regulation requires plan sponsors to provide each participant, or beneficiary, with two categories of information: (i) plan-related information, including general plan information, administrative expense information and individual expense information; and (ii) investment-related information, including performance data, benchmarking information, fee and expense information, internet web access to investment related information, and a glossary to assist participants with investment-related terminology. In English, total fees paid from each plan participant to service providers must be disclosed. Typically, the fee disclosure (in dollars) will be produced and delivered by the service providers to the plan participants via their quarterly account statements.

The problem is that while plan providers can and should help out the plan sponsors to disclose the information that is applicable to their services, the duty of getting these disclosures into the hands of the plan participants is solely the responsibility of the plan sponsor. That is why that a plan sponsor must contact their record keeper/ third party administrator if they haven't heard from them already and find out whether they will provide on the plan sponsor's behalf, the required participant disclosures on the participant statements. A plan sponsor can't afford to be like Dr. Evil in the first Austin Powers by assuming everything went to plan because it's the plan sponsor's neck on the line if it doesn't get done.

The Annual Check-Up

Everyone hates going to the dentist or the doctor for the annual checkup, you know you do. The reason you go to these checkups is to avoid a greater harm later because preventative care can go a long way to combating a disease, illness, or serious dental problems. One of my best friends in this business died before he was 40 because he wouldn't go to the doctor when he was seriously ill, he died of colon cancer less than 2 months after his diagnosis.

That is why it's surprising that plan sponsors don't do the same for their retirement plans. Sure it's not a matter of life or death, but it's a matter of financial health. Swimmers drown more than non-swimmers and plan sponsors who don't care about their fiduciary responsibility are more likely to be sued than those that do care. Plan sponsors who don't have the work of their plan providers reviewed are more likely to have serious plan errors that those who do review.



So what does an annual checkup entail? It means hiring an ERISA attorney or an outside pension consultant to review the plan documentation, review the plan administration, and review the fiduciary process. As an ERISA attorney, I am still surprised how many plans don't have an investment policy statement or administer their plan that is inconsistent with what the plan document says. There are too many plans with inefficient plan design that leaves money on the table or pay too much for their plan's administration or have no financial advisor to guide them through the fiduciary process. Plan errors usually are only discovered when there is a change of providers, so an annual review could root out errors that might never be detected. My Retirement Plan Tune-Up is the $750 annual review that I perform for those plan sponsors that request it, as well as TPAs who have hired me on occasion to review a plan from top to bottom. Whether it's my firm or someone else, I recommend plan sponsors to have their plans reviewed to ensure proper compliance and good fiduciary habits.

Sometimes plan sponsors just have to take care of the little things

A plan sponsor can take avoid some major problems by just taking care of the little things, the minutiae of running a retirement plan. That means taking minutes of all fiduciary meetings, detailing all investment reviews and changes, detailing all provider reviews and searches, as well as attendance at employee investment education meetings with the materials that were handed out. You always have to button your pants or they will fall off, so a plan sponsor should always button their fiduciary pants.

The new fee disclosure regulations are an added burden to plan sponsors and it is incumbent on them to understand their added responsibilities as a result. While plan sponsors don't have to be retirement plan experts, they need to hire experts to handle the issues for them. While many anticipate that the industry will change forever after June 30th passes, but I disagree. Change will occur after June 30th when the DOL starts auditing plan sponsors for compliance with the new fee disclosure regulations. Plan sponsors have a choice, to be a victim of these changers or to be a victor, and victory will be attained by surrounding themselves with the right retirement plan provider team.

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