Plan Sponsors' Misconceptions About Retirement Plan Fee Disclosure

By Ary Rosenbaum, Esq.

To me, there is no greater television show than Seinfeld because it's timeless and there is something about each episode that reminds you of normal day life. In the reverse chronology episode set in India called "The Betrayal", George Costanza is made at Jerry for nearly the entire episode because he found out (Elaine can't hold her liquor) that Jerry had a relationship with the woman Jerry had introduced to him named Nina. George keeps on telling Jerry "You can stuff your sorries in a sack, mister." Of course, Jerry said he still didn't know what it means. Like sorries in a sack, I am convinced that retirement plan sponsors still don't understand their responsibilities when it comes to the fee disclosure regulations. So this article is about some of the major misconceptions that plan sponsors may have concerning the fee disclosure regulations and what plan sponsors really need to know.

Understanding Fee Disclosure

Up until two years ago, there was no requirement that a retirement plan service provider fully reveal all fees they collect working on a plan (whether they are paid directly by the plan sponsor or the plan or indirectly by someone else). The big problem is that plan sponsors have a fiduciary duty to determine whether the fee for running the plan are reasonable, which is difficult if they didn't know how much they were being charged. So the Department of Labor (DOL) issued regulations under ERISA Section 408(b)(2)) which requires you (as plan sponsor) to collect fee information from "covered service providers" that receive $1,000 or more from the plan for services. 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, consulting) expecting to receive direct or indirect payment from related parties. The participant fee disclosure or what is known as the Section 404(a)(5) regulation (so named for the pertinent section of ERISA) requires you to provide information to participants for plans that are covered by ERISA and have the investments directed by the participants. You provide disclosure of plan investment-related information, including fees and expenses.

You fail to get them, it's all on you

You would think that if you don't get the fee disclosure from your plan provider, it's the fault of the plan provider. However, you'd be wrong. The failure to comply with the plan sponsor fee disclosure will be that you as the plan sponsor may be held to be partaking in a prohibited transaction by the DOLwhich 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. That's a high price to pay for someone else's mistake, but as a plan fiduciary, that mistake is your mistake if you don't follow up and get those disclosures. 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. When it's your responsibility to get these disclosures out, you just can't be a bystander especially if you are the one paying the penalty if it doesn't get done.

If you don't get them, hound the plan providers

If a plan 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. If you can't depend on your plan providers to provide you with the required disclosures, it's time to fire them. Otherwise, you'll have to explain to the DOL why you kept such incompetent plan providers on retainer.

Don't shove them in the drawer

We all get a lot of mail and we have a propensity to shove a good chunk of it that we don't throw out in the back of the drawer. When it comes to receiving the fee disclosures from your plan providers, you can't afford to shove them back in the drawer. You actually have to read them and review them. It might be written in legalese, but you have the fiduciary duty to pay reasonable plan expenses and the first step in determining whether your expenses are reasonable or nor is by knowing what the expenses are. 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.

Shop around your plan

Now that you know what the fees being charged to your plan are, the only way to find out whether they are reasonable or not is to benchmark them against what other providers charge. As plan fiduciaries, you are required to evaluate whether the fees you pay are reasonable given for the services provided since it's your duty to pay only reasonable expenses. So you either have to seek out pricing from other service providers or use a benchmarking service that could do the work for you at a reasonable fee. All you have to do is determine whether the fees you are being charged for the services provided So as long as they within the range of fees being charged by plan providers that are offering a similar level of service. 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, they then you should negotiate with your current providers to improve fees and/or service or seek out a new provider.

Don't go for the cheapest provider just because they are cheap

When it comes to retirement plan administrative expenses, it's a question about reasonableness. That means that you do not have to pick the cheapest plan provider out there. The fact is that most cheap plan providers offer a very low level of service and there are many cheap providers out there that aren't very good. As a retirement plan sponsor, you have a duty of prudence to hire quality plan providers and just picking one because they were the cheapest isn't prudent. How many times we've seen government works that have to be rebuilt because they relied on the lowest bidder. A cheap provider may also not offer the same level of service that you are currently getting. If you depend on your current plan providers to do a lot of hand holding, it's often a given that the cheapest plan provider won't offer that same level. I remember from my third party administrator (TPA) days when we assumed the TPA work for an architecture company. From day one, the human resources director was upset by the change because we didn't offer the same hand holding that she was used to. The relationship never recovered from that change even if the company was saving a few dollars in plan costs. We eventually got fired and so did the advisor who recommended us. Many plan providers can tell you how much money they can save you, bust sometimes saving a few dollars in the beginning may cost you more in the long run especially if the cheap plan provider is incompetent. You may be asked by your payroll provider whether they could be your TPA. Most often than not, it's a mistake because you are not likely to get the same quality of service you are getting from your TPA. Proper 401(k) plan administration is more than just taking employee deferrals from payroll and the payroll providers' bare bones cost service is usually met by its bare bone service. It's hard to put a price on what a quality service plan provider will charge, the only you have to do is determine whether that fees for that high quality service is reasonable for the service provided.

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