Now What? A Retirement Plan Sponsor's Guide after Fee Disclosure

By Ary Rosenbaum, Esq.

You know the feeling. You have gone through the buildup, which took place over an extended amount of time. It was such a long time; you didn't know how you would ever live to see the day when it finally did come about. Then the anticipated day or day of reckoning (depending on what it actually was) finally arrived and then you didn't know what to do, it was like "what's next?" The same can be said about retirement plan fee disclosure. There has been a discussion and buildup for years as to what the duties and liability of the plan sponsor and plan providers are in conforming to the Department of Labor's (DOL) fee disclosure regulations. So now that the age of fee disclosure for retirement plans is here, the question remains: "Now What?" So this article is what plan sponsors need to do now that fee disclosure regulations have been finally implemented.

Make sure you got all the disclosures from your plan providers

Like teachers trying to account for all the children on a class trip, a plan sponsor needs to make sure that they received all the fee disclosures that they were supposed to receive under the Section 408(b)(2) disclosures to plan sponsors. That regulation 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 (requires you as the plan sponsor 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 that should appear on participant quarterly statements based on the information provided by your plan providers. The failure to comply with the plan sponsor fee disclosure will be that you may be held to be partaking in a prohibited transaction by the DOL that will lead to an excise tax of 15% of the service provider contract in question that 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 for you under ERISA §404(c) for participant directed investments as well as possible damages in litigation by the DOL and/or plan participants.

Follow up if you don't get the disclosures

For the 408(b)(2) plan sponsor disclosures, simply blaming a service provider for not providing the fee disclosure on time isn't enough. If you do not follow up to make sure that you received the required fee disclosure, you will be at fault (unless you meet a very narrow exception). If a 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. Aside from notifying the DOL, you will need to determine whether to terminate the arrangement with the covered service provider, in accordance with the ERISA fiduciary duty of prudence. If the information that was requested by the plan fiduciary and was not provided relates to future services, the plan fiduciary must terminate the arrangement as soon as possible. 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. Obviously, a plan provider that you can not rely on to provide the information for the participant level disclosures should be jettisoned as well, relying on that same fiduciary duty of prudence rule.

Review the disclosure

It should be noted that there is no specific format for the plan sponsor disclosure from your service provider. Some of your providers may shave supplied you with a document that is similar to a service agreement, which lists each service they provide. Other providers might have includes 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. For the participant disclosure, the DOL did create a sample so it may be worth it to check the DOL's website (www.dol.gov/ebsa/participantfeerulemodelchart.doc) to see what the sample looks like and to see what is being disclosed. Consider the fee disclosures on both sides as a receipt. How many times were you overcharged on a receipt? You need to make sure your understand of the nature of the charges made against your Plan and whether the information provided is accurate and complete. Simply blaming your providers for mistakes isn't going to cut muster because as a plan sponsor, you have the fiduciary duty to make sure that the information you get is accurate and complete to comply with the fee disclosure regulations.

Be updated on changes

The release of the fee disclosure isn't enough. Each of your providers must distribute to you 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 you of this change in writing within 60 days from the date that the provider becomes aware of these changes.

Ask for clarification if it's not clear

These disclosure regulations and the disclosure themselves were drafted by lawyers, so there is always some legalese that is involved. While many parts of the disclosure can be clear, you have a right and a duty to ask for clarification. You have an obligation to solicit additional information to assure to yourself, as a plan fiduciary that compensation paid to the provider is reasonable and to fulfill your fiduciary duties. For example, you might request information about the availability of other share classes for designated investment alternatives or question about custody fees. On the other hand, plan providers are not bound to honor such requests, and such a refusal would not ordinarily raise prohibited transaction issues that should get the provider fired.

Shop around your disclosure

Too many plan sponsors think that the fee disclosure is just a form they need to put in the back in the drawer. It doesn't, it actually adds greater weight to your fiduciary responsibility. As plan fiduciaries, you are required to evaluate whether the fees you pay are reasonable given for the services provided as well as to assess whether there is potential for a conflict of interest. In order to determine if there is a possible conflict, you should request information regarding revenue-sharing arrangements the provider might have with fund providers and follow up with questions or concerns. The only way to determine whether the fees you are paying are reasonable or not is to benchmark your fees using a service or by actively shopping the plan around to other competing plan providers. 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. Reviewing your plan provider and benchmarking your fees are part of good housekeeping. I know too well what good housekeeping can do, it can be used to avoid a greater mess. Every 1-3 years (the larger the plan, the more frequent), you will need to make a full blow service provider review and determine whether the current providers should be retained or not. It's that simple. If you can't handle the process yourself, you can always contact a independent retirement plan consultant or your friendly, national ERISA attorney (cough, cough). Either way, you have to comparison price your plan and the services provided to it.

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