



Disclosure Obligations in Times of Uncertainty

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Overview

Regulation:

- fee disclosure to fiduciaries (408(b)(2))
- Schedule C for 2009
- fee disclosure to participants
- investment advice to participants

Legislation:

- Fee disclosure to fiduciaries and participants
- investment advice to participants
- target date funds



Overview

Litigation:

- Plan sponsors
 - excessive fees
 - 404(c)
 - disclosures to participants

- Providers
 - non-fiduciary
 - fiduciary

Industry: fiduciary status

Note: RLRC Bulletins



Legislation

Kohl-Harkin Defined Contribution Fee Disclosure
fiduciary disclosures:

- Four “buckets”
- discounted and “free” services
- conflicts of interest



Target Date Funds

The issues:

- 2008 losses in 2010 funds: most = 25% to 30%; one was 40%.
- Query: How to balance preservation with appreciation? What actually happens at retirement?
- Impact of annuities and guaranteed minimum withdrawal benefits.



Industry Developments

The “rush” to acknowledge fiduciary status:

- for plans.
- for participants.

The “concerns”:

- fiduciary compliance.
- avoiding prohibited transactions.



Duty to Disclose

- DOL says fiduciaries have an obligation to understand all costs and compensation being paid to make sure they are “reasonable”
 - See Advisory Opinions 97-15A and 16A

- Trend is towards full disclosure
 - To service clients, you need to disclose what you are going to get paid



Duty to Disclose

- ERISA §406(a) prohibits “furnishing of...services between a plan and a party in interest”
 - *You* are a party in interest

- *Unless* the arrangement is “reasonable” ... and no more than reasonable compensation is paid (see ERISA §408(b)(2))



Reasons to Disclose

- Risk Management
- Competition
- Congressional and regulatory activity
- Best practice



Reasons to Disclose

- Risk Management
 - Fiduciaries still have a duty to approve costs and comp
 - Contract must still be “reasonable” to avoid being a PT
 - DOL’s proposal could be adopted by plaintiffs or courts



Reasons to Disclose

- Competition
 - Schedule C requires advance disclosure of “eligible indirect comp” for plan sponsor to use “check the box”
 - Competitors may offer this to simplify reporting
 - Info disclosed in advance is not in public record



Action Items – Service Providers

- Create compliant ERISA-specific written agreements and break out services and compensation
 - obtain acknowledgement that:
 - (i) required disclosures were received sufficiently in advance;
 - (ii) by the responsible plan fiduciary; and
 - (iii) were determined to be reasonable and necessary for the establishment/operation of the plan



Action Items – Service Providers

- Create disclosure documents and procedures for delivery thereof
 - Review corporate ethics and conflicts of interest policies
 - Develop procedures to address potential conflicts
 - Develop procedures for reporting of material changes to disclosures



Action Items – Plan Sponsors

- Notify service providers of their obligation to report
- Establish procedures for information gathering and reporting
- Identify all forms of compensation and verify procedures to offset indirect payments if applicable
 - Investigate affiliations of service providers for potential conflicts



Action Items – Plan Sponsors

- Review service provider procedures concerning compensation and conflicts of interest
- Document the basis for determination of reasonableness
- Obtain and retain compliant agreements from all service providers
 - Contracts should require service providers to make disclosures



Questions?

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