



Robin Solomon and Ben Grosz Interviewed on 401(k) Plan Fee Arrangements in Light of New DOL Fiduciary Rule

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The impact of eliminating 12b-1 fees and revenue sharing fees was discussed at length by Robin Solomon and Ben Grosz in a *Fiduciary News* article entitled "A Brave New World for 401k Plan Sponsors without Conflict-of-Interest Fees" by Christopher Carosa.

With the DOL poised to release its Conflict-of-Interest (a.k.a. "Fiduciary") Rule and the SEC committed to targeting 12b-1 fees, it appears 12b-1/revenue sharing fees may soon be consigned to the dustbin of history. It's not surprising, therefore, to see many advisers singing the praises of the true Fiduciary Duty, i.e., always acting in the best interests of the client. If the DOL stays true to its word and retirement savers are saved from conflict-of-interest fees, what will this brave new world look like? Robin Solomon, a Partner with Ivins, Phillips & Barker, a tax and benefits specialty law firm in Washington D.C., says, "Generally: The elimination of revenue sharing and 12b-1 fees would be a significant paradigm shift away from today's bundled fee arrangements. Record-keepers would have to rethink how to market and sell their services. Plan sponsors and participants would have to adjust their expectations for a different fee model."

It's quick to conclude a world without conflict-of-interest fees represents a logical extension of the hoped-for ramifications of the 2012 401k Fee Disclosure Rule. "Under the new paradigm," says Solomon, "fees would be more transparent. Plan sponsors would negotiate with record-keepers for a fixed fee per participant. Fixed fee arrangements tend to be less profitable for record-keepers than revenue sharing models (in which fees generally increase as the plan



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grows in size). As a result, record-keepers may try to raise other fees to compensate for this lost income."

Smarter plan sponsors aren't waiting for the DOL to mandate the elimination of conflict-of-interest fees. Class action lawsuits have proven the potential fiduciary liability 12b-1 fees and revenue sharing hold. "I have seen a number of clients who have already evaluated whether revenue-sharing fees remain appropriate, and in a number of cases clients have decided to eliminate this category of fees," says Benjamin L. Grosz, a benefits and tax attorney at Ivins, Phillips & Barker in Washington, D.C. "Some have raised concerns about the cross-subsidization issues that can arise when revenue sharing varies significantly across different plan investment funds. For these plan sponsors, the world has already changed."

Those plan sponsors who discover they continue to have exposure to conflict-of-interest fees may need to research alternative providers of, at least, alternative compensation methods to existing providers. Grosz says, "For plan sponsors that currently offer funds with 12b-1 / revenue sharing fees, the elimination of such fees or the replacement of such funds will result in the need to find alternate sources of payment for certain vendors (e.g., recordkeepers). As plan sponsors have generally already moved toward the best practice of recordkeeping contracts with headcount-based fees (as opposed to asset-based fees), the elimination of revenue-sharing will require plan sponsors to decide whether they will impose/increase periodic fee assessments against participant accounts to cover reasonable plan expenses, or if they would rather pay these costs themselves. Both approaches may be appropriate, with employee relations and other HR considerations tending to drive this decision. Additionally, these fee structure changes (and related unbundling of fees) may lead to greater fee transparency for plan sponsors and fiduciaries. To the extent any 401k plans currently have unreasonable compensation arrangements with vendors, this provides them with an opportunity to revise and adopt an appropriate fee arrangement, as well as greater impetus and alertness to do so."

One of the options Grosz mentions is the company absorbing any fees that had previously been paid through 12b-1 fees or revenue sharing. "Participants might be fortunate if their company decides to pay for some of these services directly instead of imposing/increasing a direct participant assessment," he says. "In this case, participants will come out ahead financially."

Removing these embedded fees will have an immediate impact on the investments of employees. "For most participants, the elimination of revenue sharing and 12b-1 fees would be good news," says Solomon. Under a bundled fee arrangement, revenue sharing payments are taken directly from the fund's investment return. These revenue sharing payments may be invisible to the participant, but that doesn't mean they're free. Under the new paradigm, record-keeping fees would be more transparent. Some participants would notice that record-keeping fees appear as a new line item on their quarterly benefit statements - but in most cases this fixed fee would be lower than the invisible'

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revenue sharing alternative."