



## 408(b)(2) Call to Action: Plan Fiduciary Obligations after the July 1, 2012 Deadline

### PRACTICE AREAS

Benefits & Compensation

Retirement Plans

*Ivins, Phillips & Barker*

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July 1, 2012 was the deadline for "covered service providers" to provide newly required fee disclosures under ERISA section 408(b)(2). Now that the July 1 deadline has passed, retirement plan fiduciaries have an obligation to do the following:

- Identify all service providers potentially being paid directly or indirectly from the plan for their services.
- Confirm that every service provider on the list has provided comprehensive fee disclosures as required by the regulations or adequately explained why compliance isn't necessary.
- For any service providers that failed to either provide the required disclosures or adequately explain why compliance isn't necessary, the plan fiduciary must:
  - Immediately request in writing that the service provider fully comply as soon as possible and/or explain why it believes it is not required to comply.
  - Notify the Department of Labor within the earlier of 90 days of the date of the written request for full compliance or, if earlier, 30 days of the date that the service provider communicates its refusal to comply. Among other required information, the notice must identify whether the covered service provider continues to provide services to the plan.
  - Determine whether to terminate the contract or arrangement consistent with the fiduciary's duty to act prudently under ERISA section 404.
- With respect to service providers that submitted fee disclosures:



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- Review the disclosed fee information and assess the overall reasonableness of the fees in the context of the services being performed. Recent case law such as *Tussey v. ABB* arguably requires appropriate benchmarking, use of experts, bidding the work and other efforts.
- Review the disclosed information about conflicts of interest among service providers, their related parties and/or third parties.
- Based on the above, prudently determine whether to continue, terminate or modify contracts and arrangements with each of the plan's service providers.

Fiduciary Exposure: If a plan fiduciary does all of the above and properly documents it, he or she will have met his or her ERISA fiduciary duties under ERISA section 408(b)(2) and will avoid participating in a prohibited transaction (even if the covered service provider remains liable for a prohibited transaction). If the plan fiduciary fails to do all of the above, he or she could be in violation of the ERISA fiduciary duty rules and become a party to the prohibited transaction. Note further that compliance with the ERISA section 408(b)(2) rules does not necessarily ensure compliance with the broader ERISA section 404 fiduciary rules. In order to demonstrate prudent selection and monitoring of all vendors, we recommend regular fiduciary meetings to confirm the continuing appropriateness of all vendor contracts and relationships, bidding the work and other actions as appropriate.

Vendor Contracts: The 408(b)(2) regulations make it even more important to carefully contract with service providers. As a simple example, all vendor contracts should require regular disclosure of direct and indirect fees to enable the plan fiduciaries to satisfy their 408(b)(2) and 404 duties in this regard. Such a provision may be necessary for the plan sponsor or administrator to enforce contractual breach remedies for the vendor's violations of 408(b)(2). Similarly, the Department of Labor clearly anticipates that plan fiduciaries will terminate vendors that fail to comply with 408(b)(2) and compliant vendors that are no longer cost effective. This underscores the need to carefully draft contracts to allow for "termination by the plan without penalty to the plan on reasonably short notice under the circumstances to prevent the plan from becoming locked into an arrangement that has become disadvantageous". DOL Reg. section 2550.408b-2(c)(3).

Welfare Plans: Note that the 408(b)(2) fee disclosure regulations apply to retirement plan fiduciaries. The Department of Labor is still working on fee disclosure regulations for welfare plans. We are aware that certain vendors, including for example pharmacy benefit management vendors, are suggesting that there is no fee disclosure obligation with respect to welfare benefit plans until those regulations are finalized. This is NOT accurate. In order to have a reasonable contract with a service provider under ERISA section 408, all plan fiduciaries (welfare and otherwise) must take into account all direct and indirect compensation realized or likely to be realized by the vendor. Separately, under ERISA section 404, plan fiduciaries must always act prudently when engaging third party vendors on behalf of a plan, taking into account fee



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and other information. While welfare plan fiduciaries are not currently obligated to satisfy the specific 408(b)(2) fee disclosure obligations described above, we strongly advise them to collect, consider, and contract for all of their current and prospective vendors to regularly disclose all fees and other consideration actually or likely to be realized directly or indirectly from the plan.

Non-ERISA Plans: While the 408(b)(2) regulations apply only to ERISA plans, many states impose in general terms similar constitutional, statutory or regulatory obligations upon their governmental or other non-ERISA plan sponsors. This is not surprising as both ERISA and many applicable state law requirements originate from the same common law trust and related principles. Thus, we recommend that non-ERISA plan sponsors and administrators take the above described actions to protect themselves and their plans.

Round Two: A separate set of legal requirements requires 401(k) plan administrators to communicate fee information to participants. These communications must be provided by August 30, 2012 for calendar year plans.