
ERISA Fiduciary Refresher

Vendor Fee Disclosures

Steve Witmer
Ivins, Phillips & Barker
Suite 600
1800 Century Park East
Los Angeles, CA 90067
(310) 407-5460
switmer@ipbtax.com

December 16, 2014

Table of Contents

- Fiduciary Rule Refresher..... 4
 - Prudence 4
 - Loyalty 5
 - Follow Plan Terms 6
 - Diversify 6
- Vendor Fee Disclosure Rules..... 7
 - Step One: Identify Covered Providers... 10
 - Step Two: Collect Disclosures..... 11

Table of Contents (con't)

- ❑ Step Two: Special Rules..... 12
- ❑ Step Two: Standard..... 13
- ❑ Step Three: No Compliant Disclosure?.. 14
- ❑ Step Four: Use Compliant Disclosure..... 15
- ❑ Step Four: What is Reasonable?..... 16
- ❑ Timing Issues..... 17
- ❑ Application to Welfare Plans..... 18
- Fidelity Fee Disclosure Test Case..... 19

Fiduciary Rule Refresher

- Duty of Prudence
 - Reasonable, Prudent Person
 - Procedural Rule – Documentation!
 - Outcome is not determinative
 - Lack of affirmative action is not defense

Fiduciary Rule Refresher (cont.)

- **Duty of Loyalty**
 - Participants and Beneficiaries
 - Provide Benefits and Defray Reasonable Expenses
 - Conflict Rule
 - Example: Corporate Takeover Context

Fiduciary Rule Refresher (cont.)

- **Duty to Follow Plan Terms**
 - **Exceptions:**
 - Plan terms violate ERISA
 - Duty to follow plan terms conflicts with another duty
- **Duty to Diversify**

Vendor Fee Disclosure Rules

■ Technical Background

- ❑ Prohibited Transaction to pay from plan assets for “furnishing of goods or services, or facilities between the plan and a party in interest”
- ❑ An exception allows for “Contracting or making **reasonable** arrangements with a party in interest [for services] **necessary** for the establishment or operation of the plan, **if no more than reasonable compensation is paid therefor**”

Vendor Fee Disclosure Rules (cont.)

- Summary of DOL Interpretation of Exception – Requirements Include:
 - “Necessary” Services
 - Appropriate and helpful
 - Reasonable Contract or Arrangement
 - Reasonable in total
 - Right to terminate
 - Reasonable Compensation
 - Most of the remainder of this presentation

Vendor Fee Disclosure Rules (cont.)

- Reasonable Compensation: Why Do We Care?
 - Personal Fiduciary Liability for Prohibited Transaction
 - Prohibited Transaction Excise Tax
- General Fiduciary Duty Breach

Step 1: Identify Covered Providers

- Prepare List of Covered Service Providers
 - Categories of CSPs:
 - Fiduciary or Registered Investment Advisers
 - Platform Providers
 - Others if indirect compensation is received
 - \$1,000 minimum
 - Start with Broadest Possible List

Step 2: Collect Compliant Disclosures

- **CSP Disclosures Must Include:**
 - Services Description
 - Status of CSP
 - Direct Compensation
 - Indirect Compensation
 - Related Party Compensation

Step 2: Special Rules for Certain CSPs

- Special CSP rules:
 - Recordkeeper
 - Fiduciaries to Investment Products
 - Recordkeeper to Plans Offering Investment Products

Step 2: Standard for Disclosure

- **Specificity of Compensation Disclosure**
 - Described or estimated compensation
 - Includes ongoing and one-time/termination fees
- **Monetary Value**
- **Sufficient Information to Evaluate Reasonableness**

Step 3: No Compliant Disclosure?

- What if a CSP Fails to Provide a Compliant disclosure?
- Plan Fiduciary Can Avoid a Prohibited Transaction Penalty If It:
 - ❑ Had Reasonable Expectation of CSP Compliance
 - ❑ Upon Discovery of Failure, Makes Written Request to CSP for Compliant Disclosure
 - ❑ Upon Continued CSP Failure, Notifies DOL
 - ❑ Terminates the CSP

Step 4: Use Compliant Disclosure

- Must use the Disclosures to Verify Retention (Initial/Continued) of CSP is Prudent
 - Are Services Necessary and Appropriate?
 - Are Conflicts Appropriately Managed?
 - Is Total Compensation Reasonable?
- Must also use Disclosures w/Respect to Plan's Duty to Disclose Fees to Participants

Step Four: What is Reasonable?

- What is Reasonable Compensation?
 - Facts and Circumstances
- Advisers/External Data
 - RFP
 - Benchmarks
 - Other Sources

Timing Issues

- Fee Disclosures Required:
 - When Regulations First Effective July 1, 2012
 - New, Extended, or Renewed Contract
 - Changes in Disclosures
 - Upon Service Recipient Request
 - DOL Considering Annual Requirement/Guide
- Duty to Continually Monitor Delegations

Application to Welfare Plans

- Statute Applies to Welfare Plans
 - Prohibited Transaction Rules
 - General Fiduciary Duty Obligations
- Regulations: DOL Reserved on Welfare Plans – Considering Options, e.g PBMs
- Good faith efforts

Fidelity Fee Disclosure: Test Case

- Covered Service Provider?
- Compliant Disclosure?
 - Services
 - Status/Capacity of Fidelity
 - Direct Compensation
 - Indirect Compensation
 - Related Party Compensation
 - Special Recordkeeper/Investment Product Rules
- Reasonable? Retention Prudent?

Questions/Discussion

- Regulations Citation: 29 CFR 2550.408b-2