Sent: Monday, March 24, 2014 5:56 PM
To: EBSA, E-ORI - EBSA
Subject: ERISA Section 408(b)(2) Amendment - Protecting Participant and Beneficiary Benefits

As you are certainly aware, ERISA 408(b)(2) provides an exemption to the party-in-interest prohibited transaction rules of ERISA 406. The exemption only applies for "services necessary for the establishment or operation of the plan, if no more than reasonable compensation is paid therefor."

The ERISA 408(b)(2) exception has two parts. For the exemption to apply, the services to be provided must be disclosed in the service agreement, as well as the fees to be taken or received for those services. Fee disclosure alone is not sufficient in that any fee is unreasonable unless there are sufficient services provided to support the fees paid to or taken by the service provider from the plan. That being the case, the regulations should require that the service agreement clearly set forth the services to be provided, such that the plan fiduciary is able to determine whether the services promised, as well as the services actually provided, are sufficient for the fees to be reasonable. Neither the current 408(b)(2) Final Regulations, nor the Proposed Amendment speak directly to the issue of services, and thus the Proposed Amendment needs to be revised accordingly.

In most cases, service providers are large financial service companies that custodian the plan's assets, use a controlled entity to trustee the plan assets, or partner with an unrelated custodian or trustee in a bundled arrangement. Most of their service fees are paid directly or via revenue sharing from plan assets without further involvement by the plan sponsor or the plan fiduciaries, other than the initial signing of the service and fee agreement. In that setting, the named plan fiduciaries have limited ability to control or even know what fees have been taken by the service providers and must rely on the service providers' word that it accurately disclosed all fees that it will take or pay to related entities. The fees actually taken by the party-in-interest are never disclosed.

This is much like having the fox guard the hen house, where the farmer must ask the fox how many chickens it plans to take each year, with no real count of lost chickens at year end. There is a built in incentive for the fox to not fully disclose its intentions or its activity, since its activity often occurs in the dark of night.

While service providers generally take the position that they are not fiduciaries, they do acknowledge that they are parties-in-interest. As parties-in-interest, ERISA Section 406 and 408(b)(2) bar the service providers from receiving fee payments from plan assets that are unreasonable for the services provided. The taking of unreasonable fees is a prohibited transaction and as such the party-in-interest must disgorged the unreasonable fees that it took from plan assets. If it does not do so, the plan fiduciaries, plan participants or the DOL have the right to obtain disgorgement via litigation. This concept needs to be clearly set forth in the 408(b)(2) Final Regulations. It should also be made clear that the DOL has the ability to bar party-in-interest service providers who take unreasonable fees, and thus engage in prohibited transactions, from being able to be a service provider for an ERISA retirement plan. Doing so provides the DOL with the leverage it needs to monitor the large financial service companies that provide services to ERISA retirement plans.

The Final Regulations and Proposed Amendment currently require the service provider to disclose the fees it intends to take, and allows it to spread that disclosure amongst numerous documents and web sites, and pursuant to the Proposed Amendment, with only a rudimentary map for the fiduciary to use to find the agreement fee disclosure language. It is likely that the service provider industry will

comment that this is too difficult and certainly that they should not be required to provide their fees in a single understandable summary document. While this may be true under their current fee sharing approach, it is the investment and service providers that determine the amount and way that fees will be taken from plan assets and shared, so the complexity of disclosure and the difficulty of calculating actual fees taken or shared is of their own making. To make the required disclosures, they may need to simplify how they take fees. If it is difficult for the investment and service providers to document their fee mechanics and actual fees taken, it is certainly impossible for the plan fiduciaries to determine whether the fees paid by the plan for services are accurate and reasonable.

I propose that the 408(b)(2) Final Regulations be amended to require disclosure of investment and service provider fees in a single summary document. I also propose that the investment and service providers be required to annually disclose the actual fees taken from plan assets. Without these disclosures, the named plan fiduciaries will continue to be seriously hampered in their ability to avoid or stop ERISA 406 prohibited transactions, and thus also unable to meet their fiduciary duty of protecting participant and beneficiary benefits.

As an employee benefits attorney with 30 years of experience exclusively in the tax-qualified retirement plan market, I have been engaged numerous times to negotiate service provider agreements, and to review the fee disclosures in those service agreements. I have done this both before and after the issuance of the Final 408(b)(2) Regulations' disclosure rules. There have been some improvements to the disclosures, but "hiding the ball" is still the norm.

As a starting point, employers that sponsor retirement plans with less than $25 million in plan assets have limited ability to negotiate service and fee terms. In fact, for those under $10 million in plan assets, it may be difficult to get beyond the sales representative, who may have the ability to set price points, but seldom have the ability to negotiate fee disclosures or how fees will be taken. They also have limited ability to negotiate what services will be provided for those fees. Also, the services promised by the sales representative seldom matches services provided for in the agreements. As to fees, it is difficult if not impossible to determine the full mechanics of the disclosed fee calculations. It is even more difficult to determine the amount of fees that the investment and service providers actually take each year. This is especially the case where the plan assets include group annuity contracts, collective trusts, or various proprietary investments. It is also difficult when there are varying wrapped mutual funds with varying share classes and revenue sharing agreements between the bundled investment and service providers.

I do not think that the DOL should continue to treat large financial service companies as non-fiduciaries, allow them to take fees directly from plan assets that they custodian or otherwise control, provide limited fee disclosures and no disclosure of the actual fees taken during a year, and then place the burden upon the plan fiduciaries, who are generally individuals, to police those large financial service companies, where the plan fiduciary is generally an individual with limited leverage or resources. Doing so does little to protect the plan participants.

Thank you for your consideration.

M. Sletto

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