

ERISA Section 408(b)(2) Regulations FAQ's

Retirement plan service providers are required to disclose fee-related information to plan fiduciaries to assist them in evaluating the "reasonableness" of the service contract or arrangement under ERISA Section 408(b)(2).

Q. As a plan sponsor, what is my fiduciary responsibility?

A. It is the fiduciary's (plan sponsor's) responsibility to operate the plan prudently and for the exclusive benefit of the plan participants. This requires the fiduciary to create a process to properly select and monitor service providers, including documenting and evaluating the disclosures received by the plan service providers to determine whether the services received for the fees paid are reasonable.

Q. Does this mean I have to choose the cheapest provider?

A. Definitely not. You must consider both the services received and the fees paid in determining the reasonableness of contracts.

Q. Is benchmarking (comparing) fees enough to satisfy my obligation as a fiduciary to determine reasonableness?

A. Benchmarking is a solution only to determine how fees compare to other plans whose size and features are similar to yours. While benchmarking is helpful and will be part of the analysis that we provide to you, it does not provide complete information. The inherent limitation of benchmarking is that it does not consider the level or quality of service.

Q. Which plans are required and not required to comply with the 408(b)(2) regulations?

A. Defined contribution plans (for example, 401(k) plans, profit sharing plans, money purchase plans, and most 403(b) plans) and defined benefit plans are required to comply with the 408(b)(2) regulations.

SEP's, SIMPLE IRA's, IRA's, Non-ERISA plans (including solo plans), and 403(b) plans with no contributions since 1/1/2009 are not required to comply with the 408(b)(2) regulations.

Q. Who are "Covered Service Providers" that are required to provide the fee-related information?

A. "Covered Service Providers" that expect to receive at least \$1,000 in direct or indirect compensation in connection with the services they provide are required to disclose fee-related information to the plan fiduciaries. Covered Service Providers include the following:

1. Plan fiduciaries or investment advisors who provide services directly to the plan as an ERISA fiduciary or as an investment advisor (registered under state law or the Investment Advisors Act of 1940) or fiduciary services provided to an investment contract, product or entity that holds plan assets and in which the plan has a direct equity investment.
2. Recordkeepers and brokers who provide services to an individual account plan where plan participants direct their account investments and designated investment alternatives are available to participants in connection with the recordkeeping or brokerage services. This does not include plans which provide only self-directed brokerage accounts.
3. Other covered service providers include those who provide services and reasonably expect to receive any amount of indirect compensation for a broad range of services, such as accounting, auditing, actuarial, consulting, legal, and third party administration.

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Q. What is the date that the 408(b)(2) regulations become effective?

A. July 1, 2012 is the effective date of the regulations. By July 1, all service providers must provide their fee disclosures to plan sponsors. You will also receive fee disclosure information annually going forward.

Q. What fee-related information is required to be disclosed?

1. A description of the services provided to the plan.
2. If applicable, a statement that the service provider will be providing services as a fiduciary or as a registered investment advisor.
3. A description of all compensation the service provider reasonably expects to receive, including direct compensation, indirect compensation and compensation in connection with the termination of the contract or arrangement.
4. A description of the manner in which the compensation will be received, e.g., an invoice will be provided to the plan or compensation will be deducted directly from the plan's assets.

Q. Since I have multiple service providers, will I receive more than one fee-related disclosure?

A. Yes, you should expect to receive disclosures from all service providers associated with your plan. You will most likely receive more than one disclosure.

Q. What if there is a change in the fees charged by a service provider?

A. The service provider must disclose any change in fees within 60 days of the date the service provider knew of the change.

Q. What are the different types of compensation that must be disclosed?

A. Fees paid directly from plan sponsors to service providers (via invoice and check or ACH from your corporate account) are not subject to 408(b)(2). All fees paid by the plan or received from third parties must be disclosed, including the following:

1. Direct Compensation - compensation paid directly from the plan (from participant accounts) to a service provider.
2. Indirect Compensation - compensation received by a service provider from a third party (not from the plan or the plan sponsor). This includes sub-T/A's, 12b-1's, and other subsidies like gifts, conferences, etc.

Q. What happens if a service provider does not provide its fee disclosure to the plan sponsor?

A. The service provider has caused a prohibited transaction and the service provider is subject to a 15% excise tax. In addition, a plan sponsor must fire any service provider who does not provide the fee disclosures within 90 days of a request from the plan sponsor.

Q. What happens if a plan sponsor receives the fee disclosures from its service providers but is not properly monitoring and selecting service providers using a prudent process?

A. The plan sponsor has caused a prohibited transaction and is subject to a 15% excise tax.

Q. What if there are errors in the fee disclosure information provided by a service provider?

A. The service provider must correct the disclosure within 30 days of the date the service provider knew of the error. The plan sponsor is not liable for these errors if they acted in good faith in relying on the disclosures from the covered service provider.

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