



## Burden “Sum”

The 408(b)(2) burden on fiduciaries

**THE DEPARTMENT OF LABOR’S 408(B)(2)** regulation requires that service providers give plan fiduciaries information about their services, fees, and compensation. Between now and April 1, 2012, service providers will be giving those written disclosures to you. After the disclosures are made, the focus switches to the plan fiduciaries, who must evaluate the information. The preamble to the interim final regulation explains: “ERISA...obligates plan fiduciaries to obtain and carefully consider information necessary to assess the services to be provided to the plan, the reasonableness of the fees and expenses being paid for such services, and potential conflicts of interest that might affect the quality of the provided services.”

However, while the regulation requires that service providers give information to plan fiduciaries, the job of the fiduciary is not limited to evaluating that information. Instead, fiduciaries must make independent decisions about what information is required to make informed and reasoned decisions—and then they must obtain that information: “Ultimately, though, the responsible plan fiduciary must, under sections 404 and 408(b)(2) of ERISA, decide whether it has enough information about the services to be provided pursuant to the contract or arrangement to determine whether the cost of such services to the plan is reasonable. Accordingly, if a particular description of services provided by a covered service provider lacks sufficient detail to enable the responsible plan fiduciary to determine whether the compensation to be received for such services is reasonable, the responsible plan fiduciary **must request additional information concerning those services**” (emphasis added).

In evaluating service providers, plan fiduciaries should not limit their analysis to cost. Instead, fiduciaries must take into account other factors that are relevant to making a prudent decision, such as conflicts of interest, the results being produced by the service provider, references, and the needs of the plan and its participants. The preamble to the proposed regulation explains: “A responsible plan fiduciary should not consider any one factor, including the fees or compensation to be paid to the service provider, to the exclusion of other factors. Further, a fiduciary need not necessarily select the lowest-cost service provider, so long as the compensation or fees paid to the service provider

*are determined to be reasonable in light of the particular facts and circumstances.”*

It may seem difficult to evaluate criteria such as conflicts of interest. However, much of that responsibility can be handled by understanding and evaluating all of the compensation being received by the service provider from all sources. For example, if the service provider receives more compensation from some investments than others, has the prospect of additional compensation influenced the service provider’s recommendation—possibly to the detriment of the participants?

Once the fiduciaries have prudently selected a service provider, they must, at periodic intervals, monitor the performance of the service provider. That includes both determining that the services and costs continue to be reasonable, as well as evaluating the value of the services to the participants. Are the services being used? Are they producing results? As explained in the preamble to the proposed regulation: “[R]esponsible plan fiduciaries must continue to monitor service arrangements and the performance of service providers. Receipt of the disclosures described in this proposed regulation at the onset of a service relationship will not relieve plan fiduciaries of this ongoing obligation.”

The analysis of services and compensation is fairly straightforward. That is because both can be benchmarked, and there are services that allow fiduciaries to benchmark at a reasonable cost. The key is that the benchmarking data are based on plans of a similar size, primarily considering plan assets and number of participants.

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