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Retirement PLAN news

The importance of the 408(b)(2) fee disclosure

Plan fiduciaries are required to act prudently and solely in the interest of the plan's participants and beneficiaries when selecting and monitoring service providers and plan investments. As part of these duties, fiduciaries must ensure that arrangements with plan service providers are "reasonable" and that only "reasonable compensation" is paid for such services.

The new sponsor-level fee disclosure regulations (ERISA Section 408(b)(2)) from the Department of Labor (DOL) require service providers to send plan fiduciaries certain disclosures so the fiduciaries have the necessary information to determine whether their arrangements with the service providers are reasonable.

The new regulations are beneficial. Plan fiduciaries are now able to see the fees and expenses being charged to the plan and compare them with fees charged by other service providers. The following case demonstrates the importance of understanding the fees being charged to a plan.

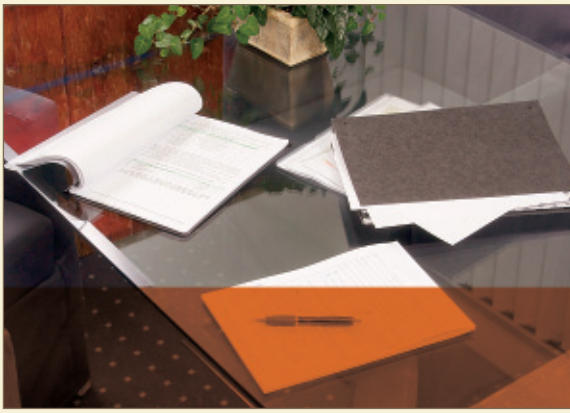
Fiduciary breach

In *Tussey vs. ABB, Inc.* (Ronald Tussey, et. al., v. ABB, Inc., et. al., WD-MO 3/31/2012), the court awarded over $35 million in damages because of a breach of ERISA fiduciary duties by an employer and its investment advisor and recordkeeper. Although the events and the decision in this case occurred before the effective date of the sponsor-level fee disclosure regulations (July 1, 2012), this case underscores the significance of those regulations.

The fiduciary had been provided with certain key information regarding higher than usual costs being charged to the plan. However, the fiduciary didn't act on the information, thus failing to fulfill its responsibility to act prudently in the interest of the plan's participants and beneficiaries.

Case background

ABB, Inc. has two 401(k) plans that permit participants to direct their contributions among investment options preselected by ABB. The plan includes mutual funds offered by **F** Investments. Defendant **F** Research is the investment advisor to **F** Investments' mutual funds offered by the plans. **F** Research invests the balances of bank accounts that hold



plan contributions in overnight securities. **F** Trust, an affiliate, serves as the recordkeeper.

Originally, **F** Trust was paid a per-participant, hard-dollar fee. Over time, the arrangement changed and fees were paid primarily by payments through revenue-sharing agreements. Under the revenue-sharing arrangement, **F** Trust's fee grew as the assets of the plan grew, even if no additional services were provided to the plan. If the plan's assets declined, the amount paid for services could decline; in which case, **F** Trust asked for hard dollars to make up the difference. **F** Trust also had the right to amend its compensation agreement for plan services.

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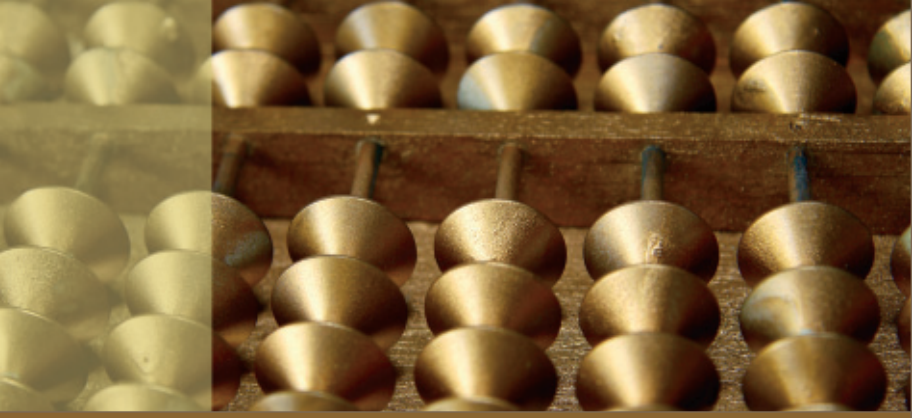

2013 COLA limits

The IRS has released the cost-of-living adjustments (COLAs) applicable to the dollar limitations for pension plans (and other items) for the 2013 tax year.

IRS Limits	2013	2012
401(k), SARSEP, 403(b), and 457 plan deferrals/catch-up	$17,500/ $5,500	$17,000/ $5,500
SIMPLE plan deferrals/ catch-up	$12,000/ $2,500	$11,500/ $2,500
Compensation defining highly compensated employee*	$115,000	$115,000
Compensation defining key employee/officer	$165,000	$165,000
Defined benefit plan limit on annual benefits	$205,000	$200,000
Defined contribution plan limit on annual additions	$51,000	$50,000
Maximum compensation limit for allocation and accrual purposes	$255,000	$250,000
IRA contributions/catch-up	$5,500/ $1,000	$5,000/ $1,000

* 2012 amount for use in 2013 plan year tests

Traditional IRA changes. There also are changes in 2013 to the adjusted gross income (AGI) "phaseout" limits for determining what portion of contributions to a traditional IRA are deductible. For taxpayers who are active participants filing a joint return (or qualified widow(er)s), the deduction begins to phase out with a combined AGI of $95,000 (up from $92,000). For taxpayers other than "married filing separate returns," the deduction phaseout begins at $59,000 AGI (up from $58,000). For a taxpayer who is not an active participant but whose spouse is an active participant, the deduction phaseout begins at a combined AGI of $178,000 (up from $173,000).

Roth IRA changes. There is also an AGI-based limitation for determining the maximum Roth IRA contribution. For married taxpayers filing a joint return (or qualified widow(er)s), the contribution phaseout begins at $178,000 (up from $173,000). The AGI phaseout for single taxpayers begins at $112,000 (up from $110,000).

The importance of the 408(b)(2) fee disclosure

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The plan's investment policy statement stated that revenue sharing should be used to offset recordkeeping costs and required ABB to leverage the plan's size and assets (over $1 billion) to reduce recordkeeping costs when revenue sharing exceeded the market value for **F** Trust's services. ABB did not comply.

F Trust also provided ABB with benefit outsourcing services, including payroll services; recordkeeping services for its health insurance, welfare plans, and a defined benefit plan; and additional retirement benefits for its highly compensated employees. **F** Trust lost money on these services, but it made a substantial profit as the 401(k) recordkeeper. A consulting firm advised ABB that it was overpaying for 401(k) plan recordkeeping fees, and it appeared the 401(k) plan was actually subsidizing the other non-401(k) plan services **F** Trust was providing. The plaintiffs contended that a breach of fiduciary duty occurred when ABB received this information and failed to take action.

Court findings

The federal district court agreed. It found that ABB and **F** Trust had breached their fiduciary duties. ABB's breaches included:

- Failing to monitor recordkeeping costs and failing to negotiate rebates for the plan,
- Selecting more expensive share classes for the investment platform when less expensive share classes were available, and
- Paying **F** Trust an amount that exceeded market costs for plan services in order to subsidize the corporate services **F** provided to ABB.

F Trust's breaches included:

- Failing to distribute float income solely for the interest of the plan, and
- Transferring float income to the plan's investment options instead of the plan.

Conclusion

The Tussey case is important because it reinforces the requirement that plan fiduciaries must be prudent when hiring and monitoring the plan's service providers. The sponsor-level fee disclosure requirements will make it easier for responsible plan fiduciaries to understand the types of fees the plan is paying its service providers and to avoid the errors made by the trustees of the ABB plans.

This case also highlights the importance of a thorough review of asset-based fee arrangements to determine if they are prudent, especially when plan assets have increased significantly.

Participant requests for plan documents

Plan administrators are required to make certain plan documents available to plan participants and/or beneficiaries. Administrators are also required to provide copies of certain plan-related information when requested by participants and beneficiaries. Copies are to be provided within 30 days of receiving a written request.

The Employee Retirement Income Security Act of 1974 (ERISA) requires plan administrators to furnish participants and beneficiaries with copies of the following documents:

- Most recent updated summary plan description (SPD)
- Most recent annual report
- Any terminal report
- The bargaining agreement, trust agreement, contract, or "other instruments" under which the plan is established

The purpose of the requirement is to give participants and beneficiaries access to documents that directly affect their benefits. The Department of Labor (DOL) considers any document that specifies formulas, procedures, methodologies, and schedules that can be applied in determining a participant's or beneficiary's benefit to be an instrument under the plan.

The term "other instruments" includes plan-related items, such as plan documents, adoption agreements, plan amendments, investment policy statements, and generally any other plan-related document that does not contain confidential information regarding another plan participant.

Reasonable copy fees

A plan administrator is permitted to charge a reasonable fee for expenses incurred in the course of providing requested information. A participant or beneficiary must be informed of the fee charged for the request.

Note: No charge can be assessed for furnishing plan information that is required to be distributed regularly by ERISA, such as a summary plan description (SPD), quarterly benefit statements, and annual safe harbor or automatic enrollment notices. However, a fee *can* be charged to provide an additional copy of a required document that was previously furnished. For example, if a participant receives an SPD and requests an additional copy two days later, the plan administrator may assess a fee for the additional copy.

Under DOL regulations, a fee for reproducing requested plan material is reasonable if it is equal to the actual cost per page for the least expensive means of acceptable reproduction, not exceeding 25 cents per page. The DOL says shipping or postage charges are not reasonable and cannot be assessed to participants or beneficiaries. Here is an example excerpted from DOL regulations (Section 2520.104b-30):

> *"For example, if a plan printed a large number of pamphlets at $1.00 per 50-page pamphlet, the actual cost of reproduction for the entire pamphlet ($1.00) would be equal to 2 cents per page. If only one page of such a pamphlet were requested, the actual cost of providing that page from the printed copy would be $1.00, since the copy would no longer be complete. In such a case, the least expensive means of acceptable reproduction would be individually reproducing the page requested at a charge of no more than 25 cents. On the other hand, if six pages of the same plan document were requested and each page cost 20 cents to be reproduced, the actual cost of providing those pages would be $1.20. In such a case, if a printed copy is available, the least expensive means of acceptable reproduction would be to use pages from the printed copy at a charge of no more than $1.00."*

Failure to comply

Failure to comply with information requests can lead to steep penalties. Under ERISA, a plan administrator who fails or refuses to provide a participant and/or beneficiary with requested information within 30 days of the date of a written request can be held personally liable by a court for up to $110 per day. Relief may be available if the failure or refusal was the result of something that was beyond the reasonable control of the administrator.

Each violation is treated as a separate event. For example, if 10 participants each requested a copy of the most recent annual Form 5500 filing and the plan administrator took 60 days to fulfill the requests, the plan administrator could face a penalty of $33,000 ($110 × 10 copies × 30 days)!

Case law example

In *Lowe v. McGraw-Hill*, 361 F.3d 335 (7th Cir. Mar. 15, 2004), McGraw-Hill was ordered to pay a beneficiary $35,050 after taking nearly two years to provide the beneficiary with copies of forms that were requested. The fine could have been much greater. The court actually reduced the fine to $50 per day for the 701 days McGraw-Hill took to provide the requested information. (The maximum penalty was $100 per day at that time.) In addition to the fine, the beneficiary was awarded $19,274 in attorney's fees.

RECENT developments

MAP-21

With interest rates at historical lows, defined benefit plans were experiencing greater liabilities and increased pension funding costs. The Moving Ahead for Progress in the 21st Century Act (MAP-21) was signed into law in July of 2012 to address these issues. The legislation contains several provisions that apply to defined benefit plans. The provisions with the most significant impact are the changes made to the 24-month average segment rates used for calculating minimum required contributions to defined benefit plans. The modification of these segment rates to rates based on a 25-year period will help ease immediate funding requirements for defined benefit plans in the near term. There is no reduction in benefits due, just a longer period of time for additional contributions, which will make up for the interest growth on plan investments that did not occur.

MAP-21 also increases Pension Benefit Guaranty Corporation (PBGC) premiums starting in 2013. The premium per participant for single employer plans increases from $35 to $42 in 2013 and to $49 in 2014. The premium will be adjusted for inflation beyond 2014. The variable rate premium will increase from $9 per $1,000 of unfunded target liability to $13 per $1,000 in 2014 and $18 per $1,000 in 2015.

The IRS issued guidance on MAP-21 in the form of Notice 2012-61 in September of last year. Topics addressed include applying the adjusted segment rates used to calculate the funding target, electing to delay using the new rates until 2013, and transition issues for plans that implement MAP-21 in 2012.

IRS Fix-It Guides

The IRS has taken a number of steps in recent years to help plans stay in compliance with increasingly complex rules. Among them are free, user-friendly Fix-It Guides that can help plan sponsors keep their retirement plans in compliance and maintain their plans' tax-favored treatment. Fix-It Guides are available for 401(k) plans, SIMPLE IRA plans, SEPs, and SARSEPs at *www.irs.gov/Retirement-Plans/Plan-Sponsor/Fix-It-Guides---Common-Problems,-Real-Solutions.*

Each guide begins with a checklist of common plan questions that can help uncover some of the more common mistakes the IRS finds in retirement plans. The goal is to reduce errors by providing a self-audit tool, which allows plan sponsors to increase the likelihood of discovering and self-correcting a mistake. Mistakes can and do happen. The earlier they are discovered and corrected, the better off everyone will be.

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