

After the DOL's Fee Disclosure Rules: Best Practices for Fiduciaries

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I. A short review of the trilogy of required disclosures

- Form 5500 Schedule C: disclosures to the DOL.
Largest issue: indirect compensation.
- 408(b)(2): disclosures by service providers to Plan fiduciaries (July 1, 2012).
- 404a-5: annual disclosure of investment performance, fees and expenses (August 30, 2012).

II. Impact on non-ERISA plans

III. ERISA 404a-5:¹ Next steps after the August 30, 2012 disclosure to Plan participants

Discussion of initial disclosure

- Process with fund platform providers (e.g., flexibility as to form and language, company stock, proper benchmarks)
- Feedback from Plan participants
- Areas of concern

¹ See also DOL FAB 2012-02 (originally issued May 7, 2012, and revised July 30, 2012 (open brokerage)).

III. ERISA 404a-5: Next steps after the August 30, 2012 disclosure to Plan participants (cont'd)

- Next up: quarterly disclosures, initial disclosures.
- Impact of fund changes.
- Risk if fail to comply.
- A word about revenue sharing and fee leveling.

IV. ERISA 408: Next steps after the July 1, 2012 disclosure by service providers

- Disclosure is required again if contract with the provider is changed.
- Each new provider must disclose before contracting.
- Risk if fail to comply.

IV. ERISA 408: Next steps after the July 1, 2012 disclosure by service providers (cont'd)

- Document that the contract is reasonable: expert review of fees and services.
- Confirm fees are consistent: fees disclosed, fees promised in the contract, and fees actually charged.
- What about disclosures of indirect compensation and conflicts?
- Document the fiduciary's due diligence review. ²

² “In evaluating whether a fiduciary has acted prudently, we therefore focus on the process by which it makes its decisions rather than the results of those decisions.” *Braden v. Wal-Mart Stores, Inc.*, 588 F. 3d 585, 595 (8th Cir. 2009).

V. Fee litigation and participant-directed investments

ERISA 404(c) process

- Plan fiduciary selects investments.
- Plan Administrator discloses information.
- Participant exercises control over investments.

V. Fee litigation and participant-directed investments (cont'd)

Fee litigation

Tussey v. ABB, 2012 WL 1113291 (W.D.Mo.), March 31, 2012. Judgment against ABB following trial for failure to monitor recordkeeping fees and negotiate rebates, for replacing the Vanguard Wellington Fund with Fidelity Freedom Funds, for selecting investments with higher share classes when less expensive share classes were available, for subsidizing Fidelity's services to ABB with revenue sharing from the ABB Plan's investments: \$35.2 million. Judgment against Fidelity for failure to distribute float income: \$1.7 million. Plaintiff's attorney's fees request pending: \$2.1 million request.

V. Fee litigation and participant-directed investments (cont'd)

Fee litigation

Tussey Dos:

- Do establish and follow an investment policy.
- Do compare the investment fund's fees to an industry standard for similar investments for similar plans. Annually.
- Do negotiate for lower fees: mutual fund share classes, as well as collective trusts and individually managed accounts.
- Do consider lowering investment fund fees by investing in collective trusts or by establishing separately managed accounts. (Note: added investment fiduciary)

V. Fee litigation and participant-directed investments (cont'd)

Fee litigation

Tussey Dos:

- Do convert basis points to overall and per participant dollars paid to the investment fund and to the recordkeeper when reviewing investment fund fees.
- Do determine whether higher revenue sharing is justified by additional work or services to the Plan by the recordkeeper.
- Do follow the Plan's investment policy and/or contract terms on payment of float and use of rebates.
- Do consider alternatives to revenue sharing, such as hard dollar per account fee assessments.

V. Fee litigation and participant-directed investments (cont'd)

Fee litigation

Tussey Dos:

- Do establish that the 408 fees disclosed conform to fees paid and to contracts, consider inquiries regarding indirect compensation.
- Do document the above and the decision-making process by a Plan fiduciary.
- Fee leveling discussion.

V. Fee litigation and participant-directed investments (cont'd)

Fee litigation

Tussey Don'ts:

- Don't eliminate a fund with an excellent performance track record of performance, and map it to a fund with comparably worse performance.
- Don't make the mistake of thinking your recordkeeper, platform provider, or mutual fund provider is a full fiduciary.
- Don't hire a consultant to evaluate the appropriateness of fees, and then not take their advice or act to negotiate more appropriate fees.

V. Fee litigation and participant-directed investments (cont'd)

Fee litigation

Tussey Don'ts:

- Don't pay nothing for services by the Plan's investment fund provider to the corporation (e.g., payroll services), and nothing for services to other corporate ERISA plans.
- Don't pay more for fees than other Fidelity clients of similar size and nature.
- Don't ignore income from float.³

³ See DOL FAB 2002-03—*Fiduciary's Responsibilities When Service Provider Retains "Float" Earnings*.

V. Fee litigation and participant-directed investments (cont'd)

Other fee litigation

Braden v. Wal-Mart Stores, 588 F. 3d 585 (8th Cir. 2009). Court refused to dismiss the case on defendant's motion for failure to state a claim. Plaintiff alleged that the Wal-Mart Plan failed to negotiate lower mutual fund fees from Merrill Lynch, and that revenue sharing payments were not reasonable compensation for services rendered by Merrill Lynch. Case settled before trial.

V. Fee litigation and participant-directed investments (cont'd)

Other fee litigation

Hecker v. Deere & Co., 556 F3rd 575 (7th Cir. 2009). Case dismissed for failure to state a claim. Plan offerings included access to 2,500 mutual funds. One Deere Plan had \$2 billion in assets, \$1.3 billion of which was held in Fidelity retail mutual funds. DOL filed amicus supporting plaintiffs. See also *Loomis v. Exelon Corp*, 658 F. 3d 667 (7th Cir. 2011)(case dismissed, plan offered 32 retail investment options).

V. Fee litigation and participant-directed investments (cont'd)

Other fee litigation

Tibble v. Edison International, 2011 WL 3759927 (C.D.Cal.)

Following trial, a partial holding for plaintiffs. Plan offered 31-50 retail-priced mutual funds, and plaintiffs alleged fiduciaries should have chosen institutional share classes. The court dismissed most claims but agreed with respect to several funds, finding the defendants did not consider less expensive share classes when electing to invest. The case has been appealed to the 9th Circuit. DOL filed amicus supporting plaintiffs with respect to the dismissed claims.

Ellen Mondress is a partner at Song Mondress PLLC, a Seattle, Washington law firm that only practices employee benefits law. Ellen leads the firm's compliance, transaction, and design practice. Her work includes advising fiduciaries on payment of fees by plans, and on fee disclosure.

Ellen is lead counsel for clients in a full spectrum of retirement plans, such as 401(k), 403(b), pension, defined contribution, and executive compensation plans; and of health and welfare plans, such as VEBA-funded, uninsured and insured plans. Her clients include Fortune 50 and 500 employers as well as privately held employers, Taft-Hartley plans, and governmental/nonprofit employers. They cross a broad range of industries, including retail, construction, energy, shipping, health care, and technology.

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In 2007, Steve was appointed to the United States Department of Labor's Advisory Council on Employee Welfare and Pension Benefit Plans (the ERISA Advisory Council), he served on the Council from 2007 through 2009 terms representing employers and their plans.

Steve is on the Board of Directors of the Profit Sharing Council of America and is also a member of its Legal and Legislative Committee. Steve also serves on the Board of Directors of the American Benefits Council. Steve is admitted to practice before the Courts of the States of Connecticut, New Jersey and New York, the United States District Court of New Jersey and the U.S. Tax Court. Steve received his J.D. from St. John's University School of Law. He is also Chief Counsel for the National Grid Foundation.