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Identifying Plan Fiduciaries Under ERISA Section 408(b)(2)—A Must Ask Must Tell Protocol

By David J Witz, Managing Director

Before 2010 ended, the Department of Labor issued final regulations under Employee Retirement Income Security Act Sections 404(a) and 404(c) requiring the disclosure of investment and expense information to plan participants. Issuing regulations addressing participant level disclosures fulfills the DOL's promise to regulate qualified plan fee disclosures using a three-pronged approach.

The first initiative was released in 2007 when DOL imposed additional annual reporting requirements on approximately 71,000 retirement plans obligated to file a Schedule C with their annual Form 5500 (238 PBD, 12/13/07; 34 BPR 2925, 12/18/07). This obligation requires plan sponsors to report service providers that receive $5,000 or more in compensation derived directly or indirectly from plan assets. This includes the obligation to report non-monetary compensation. The effective date applies to plans with a plan year-end of Dec. 31, 2009 and later.

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On July 16, 2010, DOL released the second initiative in the form of interim final regulations addressing the disclosure of service provider compensation before the inception of an engagement and thereafter. Failure to provide the required disclosures causes the fiduciary and service provider to engage in a prohibited transaction (135 PBD, 7/16/10; 37 BPR 1540, 7/20/10). Finally, the third prong of regulatory enhancements was issued on Oct. 14, 2010 by the DOL and, as mentioned earlier, this release included final regulations dictating the disclosure obligations to plan participants (198 PBD, 10/15/10; 37 BPR 2261, 10/19/10).

It should now be abundantly clear the retirement industry must operate under a new regulatory environment of explicit, non-optional, and nonnegotiable obligations to disclose more information than ever before.

 ISSN

Failure to comply with the new requirements could result in monetary damages, penalties, and potential prohibitions from providing services of any kind to a retirement plan. Personal and corporate assets are at risk for plan sponsors, their fiduciaries, and service providers.

With the stakes raised to a new level, it will be imperative for plan sponsors to identify those individuals with fiduciary authority and to inform service providers of their identity so they, in turn, know who to communicate with to meet their disclosure obligations. This has been a challenge in the past as many functional fiduciaries have denied their fiduciary role or delegated other individuals to communicate with service providers without formal or appropriate appointment.

However, in the future, ERISA Section 408(b)(2) dictates that service providers will be responsible for delivering the required disclosures to the ''responsible plan fiduciary.'' This will require a service provider to take a proactive role in determining the identity of the responsible plan fiduciary to ensure they deliver their disclosure to the appropriate person.

Although there are many ways to resolve this dilemma, asking is the most direct approach. Unfortunately, it is not unusual for internal employees of a plan sponsor to either deny their fiduciary role or operate in a fiduciary role without understanding their responsibility or liability. An effective way to resolve this problem is by questioning the primary contact.

For example, ''Are there any other fiduciaries besides you that should be attending this meeting?'' This line of questioning enables the service provider to determine if the person believes they are or are not a functional fiduciary and, if not or if so, who else might be a fiduciary, thereby providing the service provider with potentially multiple fiduciaries to target for receipt of required disclosure information. This question also permits the service provider to determine if fiduciary education is a support service that is needed.

ERISA Section 408(b)(2) specifically defines a ''responsible fiduciary'' as ''a fiduciary with authority to cause the covered plan to enter into, or extend or renew, the contract or arrangement.''[1] The preamble to the final regulation under ERISA Section 408(b)(2) states,

> ''The final regulation establishes a requirement under section 408(b)(2) that, in order for certain contracts or arrangements for services to be reasonable, *the covered service provider must disclose specified information to a responsible plan fiduciary*, defined as a fiduciary with authority to cause the plan to enter into, or extend or renew, a contract or arrangement for the provision of services to the plan.''[2] (Emphasis added)

This position was reiterated in a footnote and numerous other places in the Preamble to ERISA Section 408(b)(2) wherein the DOL, again, referenced the obligation to disclose compensation to a ''responsible plan fiduciary.''[3] With so many references, it appears the DOL has made the point that plan sponsors and service providers must now comply with the ''MUST ASK MUST TELL'' protocol of ERISA Section 408(b)(2).

To meet this obligation, service providers will first need to identify the responsible plan fiduciary. Documenting how the service provider knew the party to which it provided disclosures will be an important part of a defense if the plan is subject to a DOL audit or litigation. Service providers should ask the question previously suggested or something similar and have the person sign a form that acknowledges affirmatively their fiduciary role.

A well crafted Fiduciary Acceptance and Acknowledgement Form that comprehensively covers fiduciary roles and responsibilities may be the most valuable engagement document in a service provider's arsenal. This form will help the service provider communicate fiduciary responsibilities to the plan sponsor and confirm the person they are dealing with is the correct person.

This is particularly important given the fact that a fiduciary may not qualify to perform the obligations of a fiduciary if they have violated any requirements under ERISA Section 411 in the past. In essence, the form permits the service provider to confirm who the responsible plan fiduciary is and whether the person is qualified to act in that role.

A Fiduciary Acceptance and Acknowledgement form is a prudent part of a due diligence process to identify fiduciaries, their roles and their liability. By having this disclosure on file, service providers have the information they need to verify fiduciary status to meet their disclosure obligations.

Of course, this form is applicable to all fiduciaries including those that are service providers to the plan. Although there is no requirement to have this form on file, it does promote open discussion about fiduciary responsibilities and helps the plan sponsor and service provider identify roles and responsibilities.

A sample form is attached as Exhibit A. It is intended to address the following issues:

1. The person's position and role.
2. The person's authority to make decisions.
3. The person's acknowledgement of roles and responsibilities.

This form is just a sample, which can be modified to fit the particular circumstances and purposes of the engagement. It is recommended that service providers and plan sponsors seek the help of competent ERISA legal counsel when drafting and before entering into any agreements or acknowledging any fiduciary responsibility.

EXHIBIT A

Fiduciary Acceptance and Acknowledgement

I _____ accept and acknowledge the appointment, liability, and responsibility of a fiduciary in the capacity of:

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[1] 29 C.F.R. § 2550.408b-2(c)(1)(viii)(E) and FR 41615 (July 16, 2010)

[2] FR 41601 (July 16, 2010) also see 29 C.F.R. § 2550.408b-2(c)(1)(i)

[3] FN 14, FR 41614-15 (July 16, 2010) ''The Department did not intend this interpretation; as stated in the final rule, there are alternatively acceptable formats for *disclosing compensation to a responsible plan fiduciary*, so long as the description sufficiently permits evaluation of the reasonableness of such compensation.'' (Emphasis added)

  ISSN

- ☐ Named Fiduciary - ERISA § 402(a)
- ☐ Plan Administrator - ERISA § 3(16)
- ☐ Plan Trustee - ERISA § 403(a)
- ☐ Investment Advisor – ERISA § 3(21)
- ☐ Retirement Committee
- ☐ Administrative Committee
- ☐ Investment Committee
- ☐ Investment Manager – ERISA § 3(38)

on behalf of _____ (name of plan).

In accepting the fiduciary role identified above, I recognize that my actions are subject to the fiduciary standards of the Employee Retirement Income Security Act (''ERISA'') of 1974 which are the highest known to law. I acknowledge my obligation to act with a duty of loyalty and under a standard of care that imposes upon me the requirement to educate and familiarize myself with the issues under consideration before rendering a decision. As well, I understand I may rely upon the opinions of experts retained to advise me without abdicating my responsibility blindly to any outside person or entity. To do anything less is a violation of my fiduciary duties.

Furthermore, I understand that I have a responsibility and obligation to engage in the appropriate research to make informed decisions:

1. In the best interest of the plan participants and beneficiaries.[4]
2. That would be considered a reasonable contract and defray reasonable costs for services rendered.[5]
3. To establish and follow a prudent administrative and investment process.[6]
4. To retain the services of independent objective experts where I or my co-fiduciaries fail to possess the needed expertise.[7]
5. That reduces the risk of large losses through diversification.[8]
6. That follows the governing plan documents unless it is clearly prudent not to do so.[9]
7. That is free of conflicts and self-dealing.[10]

Furthermore, I agree to divulge and inform my co-fiduciaries and the authority to which I am subject in the position I have accepted any personal, family (regardless of how distant), or business relationship or interest now or in the future that may, could, or would be considered a conflict of interest and/or subject the plan to a prohibitive transaction claim.[11]

While I understand the Plan Sponsor may have adopted ''indemnification'' provisions corporately and/or under the ERISA plan document, such exculpatory provisions may be considered void as against public policy.[12] Therefore, I recognize the liability I have accepted exposes my **''PERSONAL NET WORTH''** to attachment, if necessary, to restore plan losses and to disgorge any profits[13] to satisfy an ERISA breach associated with my actions, the actions of my co-fiduciaries, or my lack of action may have caused. Personal Assets can include but are not limited to:

1. Private residence and other real estate holdings,
2. Vehicles and other hard assets,
3. Securities and other investment accounts, and/or
4. Retirement plan account balance.

In addition to these legal remedies, I understand that I may be subject to equitable remedies such as actual removal from my position as a fiduciary temporarily or a permanent injunction against acting as a fiduciary to any ERISA plan.[14]

I acknowledge that in my role as a fiduciary to the plan that I may be jointly and severally liable for the actions of other fiduciaries. However, I understand that I generally have no liability for any breach that has occurred before my appointment or which occurs after I cease my role and responsibilities as a fiduciary to the above mentioned ERISA plan.[15]

I also, understand that should the plan sponsor elect not to purchase a Fiduciary Liability Policy it is in the plan participants', beneficiaries' and my own best interest to personally secure the same coverage out of my own pocket to protect the benefits of plan participants and their beneficiaries along with my personal net worth.

I certify that I am not under investigation for any criminal charges nor have I been convicted of or imprisoned as a result of a conviction that would prevent me from serving in the role of a fiduciary or service provider to an ERISA plan. Furthermore, there has never been an injunction that would prevent me from serving as a fiduciary to an ERISA plan.[16] Should my circumstances change, I will immediately inform my co-fiduciaries and the authority to which I am subject and tender my resignation.

Under penalties of perjury, I attest that I have read this Fiduciary Acknowledgement form and can accept the Fiduciary role to which this form applies believing that my responses reflect what is true, correct and complete.

_____(Signature) _____(Corporate title)

_____(Date)

A separate copy of the Fiduciary Acceptance and Acknowledgement form is available at http://op.bna.com/pen.nsf/r?Open=abyf-8ehnzs.

[4] ERISA § 404(a)(1)(A)
[5] ERISA §§ 403(c)(1), 404(a)(1)(A), 408(b)(2) and 29 C.F.R. § 2550.408b-2
[6] ERISA § 404(a)(1)(B)
[7] ERISA § 404(a)(1)(B)
[8] ERISA § 404(a)(1)(C)
[9] ERISA § 404(a)(1)(D)
[10] ERISA §§ 406 and 408
[11] 29 C.F.R. § 2550.408b-2(e)(1)
[12] ERISA § 410
[13] ERISA § 409(a)
[14] ERISA § 502
[15] ERISA § 409(b)
[16] ERISA § 411