

408(B)(2) PLAN SPONSOR SOLUTIONS TRANSCRIPT

Part C: How does 408(b)(2) differ from other disclosure regulations?

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Webinar Panel: Moderator: Edward M. Lynch, Jr., Founder and Chief Executive Officer of Fiduciary Planned Governance, LLC. ("Ed")

Panelists: Mary Rosen, Associate Regional Director of the Department of Labor EBSA in Boston. ("Mary")

Louis S. Harvey, Founder and Chief Executive Officer of DALBAR, Inc. ("Lou")



Question 2:

How does 408(b)(2) differ from other disclosure regulations?

Ed:

So what we have here again is that term prudent process and it must be applied.

This seems to speak to something that in our preparation for this Webinar, Mary has mentioned more than once, and that is that the 408(b)(2) is different from other disclosure regulations.

If I may draw a parallel, under the traditional disclosure regulation, it's more, "Well I get this information, check the box that I received the information, I pass the information on, and I check the box that I passed the information on and I'm done."

How does 408(b)(2) differ?

- 408(b)(2) regulation differs because it is...
 - Plan sponsors may have to reimburse plan for excessive fees
 - Requires every plan sponsor to evaluate and act
 - Cannot be delegated to service providers to execute
 - Service provider failures are reported to DoL

8

Mary:

It differs in a number of ways, Ed.

First of all, it requires the plan sponsor to act on the information.

So, the plan sponsor doesn't just receive the information and pass it along, there's a requirement to determine that the service is reasonable and necessary and the compensation is reasonable and he can only do that by going through a prudent process and evaluating the information that he's receiving.

There are ramifications for both the plan sponsor and the service provider for failing to meet the exemption or the regulation.

For the plan sponsor, if the terms are not met, it will be a prohibited transaction because it will no longer exempt the transaction, so all of the ramifications that fall from that would apply.

The plan sponsor may have to reimburse the plan for excessive fees, for instance.

As far as the service provider is concerned, if the service provider fails to disclose the information, he could face an excise tax penalty. He could also be reported to the Department of Labor.

One of the requirements is if a plan sponsor doesn't receive the information required under the regulation, the plan sponsor is supposed to report back to the Department of Labor. So, he has the requirement to act both on the information received and determine if it's reasonable, and if he doesn't receive [proper] information, to pass it [that fact] along back to the Department of Labor.

Lou:

It would seem to me, if I could jump in here, that the big difference here is once somebody receives these disclosures, they've got to act. It's not something that one can put in a file and check the box and say, "done."

Mary:

Exactly.

Ed:

Lou, you've talked about a sort of health check in terms of the zones: the comfort zone, the action zone, and the disclosure zone. So let's go further.

What does "acting" on the part of the plan sponsor look like, in practical terms?

Lou:

The plan sponsor would be obligated to terminate the service provider if they find that it's unreasonable or to negotiate another arrangement.

In day-to-day practical terms, they might have to change share classes.

The other issue here is if they find a deficiency in the disclosure, then they would be required to notify that service provider, and give them 90 days to respond, and failing to respond, report the failure to the Department of Labor.

So the actions range from renegotiation to replacement of the service provider, as well as reporting to the Department of Labor.

I'd also say that one of the things that we encourage is that this is a great time to look at your plan to see if it's properly configured. So another opportunity is maybe you want to look at your plan to see whether automatic enrollment would be a good thing to add. So it's a time for review and action, some of which is regulatory action and the other could simply be improving the plan.