

## 408(B)(2) PLAN SPONSOR SOLUTIONS TRANSCRIPT

### *Part D: Can a plan sponsor rely on the service providers to comply with 408(b)(2)?*

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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")



DALBAR, Inc. | Federal Reserve Plaza | 600 Atlantic Ave, FL 30 | Boston, MA 02210 | 617.723.6400 | www.dalbar.com

### Question 3:

Can a plan sponsor rely on the service providers to comply with 408(b)(2)?

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#### **Ed:**

So obviously the time is increased for due diligence in order to really be in compliance with the expectations and requirements of the regulation. So let's then look at the situation, if you will, in real-world terms.

Plan service providers in many cases have been gearing up for this for a long time, since the regulation was proposed. Many of them are close to, or already have their disclosures ready, at least in sample form. And there certainly is an impression that is being given in the industry that for the most part the service providers are going to provide all the information that a plan sponsor needs and in many cases, particularly with record-keepers, they're also providing disclosures for the participants.

So many plan sponsors and many advisors are of the opinion that they can just rely on what the record keeper has provided to fulfill their obligations, yet that seems, based on what we're saying this is clearly not the case.

Mary, can you speak to that?

- Plan sponsor cannot rely on service providers because...
  - The 408(b)(2) responsibility is exclusively the plan sponsors'
  - Service providers cannot be expected to judge their own work and their own pay
  - A service provider cannot be expected to act in contradiction to its own interest
  - Service providers may not be fiduciaries
  - Service provider's only job is to make the disclosure, it is the plan sponsor that must say if it is reasonable

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**Mary:**

Yes, that clearly is not the case. The regulation requires two things to happen:

- the disclosure to be made and then
- the determination that the disclosure is reasonable, that the contract is necessary, and that the fees are reasonable.

So relying on the service provider's disclosure would be a mistake on the part of the plan fiduciary. The whole idea is to go through a prudent process and make sure that everything is reasonable.

So if he just accepted the disclosures on the part of the service providers, it wouldn't meet the terms of the exemption.

He certainly can't expect the service providers to judge whether it's reasonable or not, it's not their responsibility.

Plus, they would have a conflict situation-- they [service providers] can't be expected to judge their own performance, their own product, or their own work.

Clearly the regulation sets out that it's the responsibility of the sponsor to make the determination.

So I guess a short answer to the question is no, a plan sponsor cannot rely on service providers.

**Lou:**

I'd like to add in (look at bullet point three the screen), that the service provider cannot be expected to act in contradiction to his or her own interest.

That's a fancy way of saying, which service providers would actually fire themselves?

That's really what you're talking about here. If you take off the table the fact that the service providers are not going to fire themselves, then what's the point? The fact of the matter is that this responsibility needs to be performed independently of the service provider.

**Ed:**

So it's not that the plan sponsor can't have the process managed for them, by say an independent party, but that it would be imprudent, on the face of it at least, for the plan sponsor to rely on any of the service providers that they're currently working with to manage that process or to rely solely on their disclosures.

So let me ask a question, because again this has come up particularly at the advisor conferences that I've been attending, where there's actually an advocacy going on in which this is being presented as an opportunity for advisors, particularly investment advisors, to either expand their service offering to their clients or to assume another area of responsibility by managing this process in total for their clients and help them to carry it through to conclusion.

It seems to me that that runs the contrary to exactly everything we've been saying here, that by definition would be inappropriate.

**Lou:**

Very definitely. It's our view that the advisor on the plan can play a role assisting the plan sponsor in gathering data and things like that, but when it comes to the evaluation of whether or not the service is reasonable, the advisor has to take themselves completely out of that role.

It becomes the kind of thing where the advisor could use an external service or the plan sponsor could use an external service, like the sorts of things that you're offering, Ed, at Fiduciary Plan Governance, at Fee Source, or it could be part of the services that we offer with the evaluation services that we do here.

So the whole notion is that the plan sponsor has several options that he can choose, in fact we will talk about it in a little while.