

408(B)(2) PLAN SPONSOR SOLUTIONS WEBINAR Q&A

May 21, 2012

INTRODUCTION

This Q&A is in response to specific questions that were raised before, during and after the 408(b)(2) Plan Sponsor Solutions Webinar of May 16, 2012. The reader is expected to be familiar with ERISA 408(b)(2) and has attended or watched the recording of the Webinar. The Webinar is available on www.ERISAFeeDisclosure.com.

Additional questions are invited and these will be added as received and the updated document posted to www.ERISAFeeDisclosure.com.

The questions and answers are grouped into subject areas to facilitate locating a question and to bring answers to similar questions together in one place.

1. **General:** Various issues that apply to multiple subjects.
2. **Covered Service Provider:** Applies to questions about what parties are required to deliver disclosures to plan sponsors. The free tool "CSP Determinator" is available on www.ERISAFeeDisclosure.com.
3. **Fee Zones:** Questions about the uses and methods of Fee Zones are answered here. Further details are available in the [paper](#), "Fee Zones of Retirement Plans" on www.ERISAFeeDisclosure.com.
4. **Fiduciary Concerns:** Addresses issues of fiduciaries other than the Responsible Plan Fiduciary (typically the plan sponsor).
5. **Non-Compliance:** Questions that relate to non-compliance and required actions.
6. **Plan Audit:** Addresses the potential role of plan auditors.
7. **Prudent Process:** Questions of prudence in evaluation plan service providers.
8. **Required Disclosures:** Questions regarding the content of disclosures

ID	Date Posted	Question	Answer
1.00	General		
1.01	05/16/2012	What were the web sites that were mentioned?	There were three sites referenced: www.ERISAFeeDisclosure.com www.FiduciaryPlanGovernance.com www.dol.gov/ebsa
1.02	05/16/2012	If the fee disclosures are not made until July 1, when does the analysis have to be made by or a conclusion that the fees are reasonable? 30 days, July 31.	There is no prescribed date for the analysis. It can take place before or after the effective date of the regulation. It is recommended that the analysis be done on an annual basis to ensure that the results do not become outdated.

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1.03	05/16/2012	If it's not going to be addressed in the presentation, could speakers cover other types of employee benefit plans. Seems to be focused on DC only.	<p>The disclosure discussion applies to a variety of plans.</p> <p><i>Reference:</i> (c)(1)(ii) Covered plan Applies to a pension plan described in section 3(2)(A) (and not described in section 4(b)) of ERISA.</p> <p>Does not apply to a "simplified employee pension" (IRC 408(k)); a "simple retirement account" (IRC 408(p)); an individual retirement account (IRC 408(a)) or an individual retirement annuity (IRC 408(b)).</p>
1.04	05/16/2012	I am a plan advisor. Our broker dealer has sent a service disclosure agreement and instructed us to get it signed by our plan client in order for us to be in compliance. Does the statute require a signature from sponsors or is that just some lawyer thinking it will cover us if something happens?	<p>There is nothing in the ERISA regulation that requires a signature from the sponsor on a 408(b)(2) disclosure?</p> <p>This procedure is unnecessary and burdensome since a failure to deliver requires a 90 day notice during which time failure can be corrected without any form of penalty.</p>
1.05	05/16/2012	Do you have particular advice or wisdom for smaller plan sponsors looking at all of this? It seems a possible unintended consequence could be plan sponsors terminating plans rather than deal with all of this and the attendant risks. Certainly that isn't the DOL's intent, but it seems likely. What are your thoughts?	<p>The risk of terminating the plan is recognized as a potential consequence of making the assessment and is handled by including the needs of the plan sponsor in the evaluation of reasonableness. The DALBAR evaluation assigns an economic value to meeting the plan sponsors' needs (see exhibit at end of presentation). This aspect of the process ensures that "reasonableness" includes the incentive for the plan sponsor to retain the plan.</p> <p>The pricing of DALBAR's evaluation (Prudent Process) is scaled to be affordable for small plans.</p>
2.00	Covered Service Provider		
2.01	05/16/2012	What if the plan allows the participants to invest their money with the broker of their choice? For example, a plan of 30 doctors with 30 brokers. Does the plan need 30 plan disclosures? No, unless the brokerage firm was also acting in a fiduciary capacity or was actually a Registered Investment Advisor.	<p>In this example, if all 30 brokers are covered service providers from different firms, then each would be required to make a separate disclosure.</p> <p>This would apply whether this was an RIA or a broker/dealer.</p> <p>Use the "CSP Determinator" on www.ERISAFeeDisclosure.com to obtain a precise answer for the situation.</p>

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2.02	05/16/2012	I think that part of my question relates to those "sales reps" who are both Registered Reps (duty of suitability) and who are also IAR (Investment Advisory Reps of a RIA) who sold an insurance companies' group variable annuity but who also has fiduciary responsibility under SEC as an IAR?	Please use the "CSP Determinator" on www.ERISAFeeDisclosure.com to answer the specific circumstance being considered.
3.00	Fee Zones		
3.01	05/16/2012	What were all the fees that were included in the Comfort Zone?	Please see the paper , "Fee Zones of Retirement" Plans on www.ERISAFeeDisclosure.com .
3.02	05/16/2012	On the "Quick Check on Your Plan Fees" chart, shouldn't number of participants be part of the analysis?	The intent of the zone guide is to provide a shortcut to a general assessment of exposure on a one page document. Head counts and many other factors are part of DALBAR's detailed evaluation process (See exhibit at end of presentation).
3.03	05/16/2012	In the "Quick Check on Your Plan Fees" guide, how were the numbers arrived at? Are they strictly historical, or have they been adjusted for fees that may not have been reported in the past?	<p>The statistics are based on 2011 data and is based only on plans whose sponsors are confident of their awareness of fees. For further details please see the paper, "Fee Zones of Retirement Plans" on www.ERISAFeeDisclosure.com.</p> <p>The levels are subject to change in the future due to the effects of fee disclosure such as to depress fees and to increase awareness.</p>
3.04	05/16/2012	From Slide 6, "Quick Check on Your Plan Fees", is there any data on the reasonable total in fees in group variable annuities versus other structures of 401k plans and what is a reasonable fee, including the advisor's fee?	<p>Such a distinction is beyond the scope of the "Quick Check on Your Plan Fees".</p> <p>The DALBAR evaluation process (See exhibit at end of presentation) assigns value to the characteristics of products such as the expected return, guarantees, etc.</p> <p>The advisor's service is separately evaluated, as are other plan services. DALBAR evaluations put a discrete worth on the advisor's services, based on the value to the plan. This applies whether the fee is bundled with an all-in cost or charged separately.</p>

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3.05	05/16/2012	Can you break down Zones by CSP type. That is, is there a chart for Advisors or are they lumped into the chart on P6?	Such breakdowns are part of the DALBAR evaluation but are beyond the scope of the "Quick Check on Your Plan Fees". See exhibit at end of presentation for the content of the DALBAR evaluation.
3.06	05/16/2012	Are the zone fee rates in the "Quick Check on Your Plan Fees", based on current fees adjusted for the impact of new disclosure items, or strictly historical experience?	<p>The rates in the current "Quick Check on Your Plan Fees" have not been adjusted for the potential impact of new regulations.</p> <p>The rates are subject to change in the future due to the effects of fee disclosure such as to depress fees and to increase awareness.</p>
4.00	Fiduciary Concerns		
4.01	05/16/2012	Part of this question relates to the fact that Fiduciary responsibility under 3(21) I thought was not to guarantee results, but rather the guarantee of a process? How does that interact with total in fees and fiduciary responsibilities of the IAR.	<p>Fiduciary responsibilities under ERISA are different and wider than those of an IAR under the Investment Advisers Act of 1940 (IAA).</p> <p>An IAR serving an ERISA plan must assume both sets of responsibilities and in the event of a conflict must act in the best interest of the participant.</p>
4.02	05/16/2012	Is a person providing this evaluation service considered a fiduciary?	<p>The evaluation is not a fiduciary process. If the person performing the evaluation is already a fiduciary, the evaluation may be considered a conflict of interest.</p> <p>The DALBAR evaluation process addresses this issue by limiting the role of fiduciaries to assisting in collecting data and interpreting results of the DALBAR evaluation.</p>
5.00	Non-Compliance		
5.01	05/16/2012	Who reports failure in practice?	Failure to comply may be reported in two ways. First is for a plan sponsor to obtain an exemption by filing a complaint with the DoL and secondly, for a plan auditor to include non-compliance in an audit report.

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5.02	05/16/2012	Who pays the excise tax? The service provider is the disqualified person and responsible for the payment. However, this could include the fiduciary for the plan if they do not qualify for exemptive relief.	A responsible plan fiduciary that obtained an exemption by filing a complaint with the DoL will have no exposure to excise taxes or reimbursements to the plan. In this case, the burden is entirely the service provider's. Failing to file for an exemption or being refused one, exposes both the responsible plan fiduciary and service provider.
5.03	05/16/2012	We are seeing draft disclosures that are obviously designed to overwhelm participants and hide secrets from plans. Is the Department going to upgrade the disclosure rules to mandate at least a summary statement: The fee, a yes or no on conflicts, a yes or no on fiduciary and a generic service description?	Responsible plan fiduciary should give 90 day notice that disclosure is unusable and if not corrected apply for DoL exemption.
6.00	Plan Audit		
6.01	05/16/2012	Is this review done by the plan auditor? When will DOL actually look unless in random audit?	The question as to the specific role that fee disclosure regulations will play in a plan audit is not fully resolved. The plan's exposure to excessive fees and its ability to recover those excesses are likely to be considered in an audit of a plan's financials. The DoL's specific plans are not known, however, there have already been electronic scans of 5500 reports to identify exceptions.
6.02	05/16/2012	Is it true that a company's outside accountant is responsible for validating that the company has complied with 408(b)(2) and report any deficiencies to the DoL?	It is expected that outside accountants will examine plans for exposure to excessive fees and include deficiencies in the audit report that is sent to the DoL.

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7.00	Prudent Process		
7.01	05/16/2012	What if a plan sponsor has an investment advisor that is not employed by the asset custodian? Can that investment advisor provide services related to 408(b)(2) compliance?	An investment advisor that is unaffiliated with a service provider will still have the conflict since he/she provides a service to the plan. In such a circumstance, the investment advisor may assist the plan sponsor in collecting information and reviewing results of an evaluation but would not be able to perform the evaluation him/herself.
7.02	05/16/2012	Your analysis seems very subjective based on the agent who is reviewing compliance. How is the plan sponsor ever going to know that they are okay with what they are doing?	The analysis is <u>not</u> performed by a human agent, but by a mathematical algorithm. Subjective factors, called "X Factors" are weighed by the algorithm. See the Exhibit slides at the end of the presentation for an example of this.
7.03	05/16/2012	The question relating to methodology for Tools and the discussion of a Prudent Process which included Tools like a Call Center with low participation. If the plan is a safe harbor plan, what difference does Tools and individual advice make?	Tools and individual advice are services that are prohibited in a safe harbor plan, unless they qualify for an exemption. Qualifying for an exemption requires that the responsible plan fiduciary must determine that the service is necessary, reasonable and cost effective.
7.04	05/16/2012	Shouldn't each expense (recordkeeping, advisory services, fund expenses, etc be evaluated SEPARATELY vs. looking at total plan costs? (e.g., the recordkeeping fee may be very low but the advisory fee or fund fee is very high but overall expenses fall into the comfort zone).	The " <i>Quick Check on Your Plan Fees</i> " by its nature is only a superficial look. The DALBAR evaluation does take these factors into consideration as part of the prudent process. See exhibit at the end of the presentation.
7.05	05/16/2012	Is an independently provided benchmarking report the best way to judge the service providers?	A benchmarking report is an important tool that may be used in place of the " <i>Quick Check on Your Plan Fees</i> " but such a report would not constitute the required prudent process of evaluation.
7.06	05/16/2012	Do you have a sample report to sponsors on the DIA?	Yes, a model report is available as part of the Fee Disclosure training available on www.ERISAFeeDisclosure.com .

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8.00	Required Disclosures		
8.01	05/16/2012	What needs to be disclosed with advisor managed model portfolios?	<p>Disclosure requirements for a model portfolio depend on whether it is a designated investment of the plan or not.</p> <p>If it is not a designated investment the general plan disclosures apply. If the model portfolio is a designated plan investment, then the investment disclosures also apply.</p> <p><i>Reference:</i> (c)(1)(iv) Initial disclosure requirements</p>
8.02	05/16/2012	What is included in the plan fees? Does it include accounting, legal, etc. or just the primary fees such as RK, Admin, Consultant, Inv. Mgmt & Custody?	<p>Disclosures are required from all Covered Service Providers. There are three classes of CSPs, 1) Fiduciaries, 2) Record keepers and broker/dealers and 3) Recipients of indirect compensation.</p> <p><i>Reference:</i> (c)(1)(iii) Covered service provider</p> <p>The "CSP Determinator" may be used to make a determination in specific cases. The "CSP Determinator" is located on www.ERISAFeeDisclosure.com</p>
8.03	05/16/2012	The recordkeeper needs to provide information to the plan sponsor on the DIA's. We will also need to provide DIA information to participants under 404(a)(5). Can these reports be identical?	<p>Yes, providing that the participant disclosure also include the information required by the plan disclosure.</p> <p><i>Reference:</i> (c)(1)(iv)(E) Investment disclosure—fiduciary services and (c)(1)(iv)(F) Investment disclosure – recordkeeping and brokerage services</p>
8.04	05/16/2012	Insurance providers never disclose the spread between their cost of funds and the crediting rate on their guaranteed contract/stable value. Since that is technically participant money and since the use of participant money has to be disclosed, does their failure to do so need to be reported to the Department by the plan sponsor as non-compliance?	<p>Certain providers have set the bar by disclosing these, even though the regulations do not require it. In such cases, plan sponsor should consider giving 90 day notice to the service provider that disclosure is unusable, followed by filing for an exemption.</p>
8.05	05/16/2012	How are things (indirect) like FX, commissions etc. to be evaluated?	<p>Trading commissions are considered part of the acquisition or disposition cost and are not reportable as "fees".</p>

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8.06	05/16/2012	Does this 408(b)(2) apply to plan auditors' fees?	If these fees are indirect, they would be reportable under 408(b)(2). <i>Reference:</i> (c)(1)(iii)(C) Other services for indirect compensation
8.07	05/16/2012	Do you have to include legal services or audit expenses if they aren't paid out of plan?	Yes, if paid indirectly, but no if paid by the plan sponsor. <i>Reference:</i> (c)(1)(iii)(C) Other services for indirect compensation
8.08	05/16/2012	Doesn't the reporting and disclosure requirements apply only to expenses borne by plan participants; i.e., those paid from or incurred by the plan trust assets? For example, if TPA fees are paid by the sponsoring corporation, and not from trust assets, we have assumed that TPA fees would not be subject to either set of disclosure rules. Are we correct in our understanding?	Regulations do not require disclosure of payments made by the sponsoring corporation, but there is no prohibition against it either. It is a good idea to make such disclosures, especially for participants to recognize the contribution made by their employer. For purposes of the DALBAR evaluation, the cost of the TPA services would be excluded from the target price calculation.