



# Understanding and benefiting from DOL's new 408(b)(2) rule

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# Topics

- What does it mean to be a fiduciary?
- What is 408(b)(2) all about?
- Three key disclosures required by 408(b)(2)
  - Services
  - Cost
  - Status
- Why is the rule important?
- What are prohibited transactions?
- What is a prohibited transaction exemption?
- Why and how to comply

# Who is a fiduciary?

- Anyone who is legally responsible for looking after other people's money
- Decision-making employees of the plan sponsor, also known as “stewards”
- Some, but not all, service providers

# Obligations of fiduciaries

- Primary duties of a fiduciary:
  - Loyalty: Serve the exclusive best interest of the plan participants and beneficiaries
  - Due care: Exercise the skill, diligence and prudence of a professional
- Most stewards delegate some fiduciary duties to investment advisors and managers.

# Prudent delegation is critical

- Stewards must use a prudent process to select service providers.
- Duties of loyalty and due care require stewards to consider:
  - The services to be rendered
  - The cost of services
  - The fiduciary status of the service provider

# DOL's three-part push for better information

- 408(b)(2) – Information from service providers to Plan Sponsors
- 404(a)(5) – Information from plan sponsors to participants
- Revised Form 5500 – Information from plan providers to regulators and plan participants

# The importance of 408(b)(2) regulation

- Requires plan sponsors to enter only into “reasonable agreements”
- Service providers must disclose their services, costs and fiduciary status. Plan sponsors must consider the information.
- Failure to comply can result in prohibited transactions with onerous penalties.

# Prohibited transaction and exemptions

- Fiduciaries must not act irresponsibly, e.g., use plan assets to serve their own interests.
- Not all transactions are abusive; exemptions define when and how certain expenditures can be made.
- 408(b)(2) acts as prohibited transaction exemption, allowing expenditures for services that serve the best interests of participants and beneficiaries.



# Selecting a knowledgeable advisor

- Stewards need help navigating their own fiduciary duties.
- Stewards must prudently select the advisor, including careful review of 408(b)(2) disclosure information.
- Best source of information is often the proposed client services agreement

# What to look for in the advisor's proposed services agreement

- Services: What will be provided and what will not.
- Cost: Compensation and sources of compensation.
- Status: Does the advisor accept fiduciary responsibility? [Note: If the agreement is silent on fiduciary status, the provider is not accepting fiduciary status.]

# Benefiting from 408(b)(2)

- 408(b)(2) disclosures can help stewards:
  - Reduce regulatory and litigation risks
  - Make good service provider selections
  - Delineate roles and responsibilities
  - Serve the best interests of plan participants through fiduciary excellence
- A knowledgeable advisor can help interpret the disclosures of other service providers.

# Why 408(b)(2) must not be ignored

- Stewards must only enter into “reasonable agreements” with service providers.
- Without the required disclosure information, an agreement is unreasonable.
- Service providers are accountable for the disclosure information.
- Stewards enjoy a “safe harbor” if they rely upon information that proves to be faulty.

# Summary of the plan steward's and advisor's fiduciary duties

Fiduciary duty	Plan steward's obligations	Advisor's obligations
Loyalty	Assure contracts with service providers are reasonable and serve participants' best	Avoid prohibited transactions and fully disclose any other conflicts; serve participants' best interests
Due care	Conduct thorough due diligence to select service providers	Perform contracted services with the skill, judgment, prudence and diligence of a professional

# Suggested next steps for stewards

- Start asking your service providers for their 408(b)(2) disclosures now.
- Use the 408(b)(2) disclosure information to benchmark potential service providers.
- Work with service providers that can help you navigate your fiduciary duties.
- Promote fiduciary excellence by strengthening your investment processes.

Questions?

