408(b)(2) disclosure for Health and Welfare plans on the horizon?

408(b)(2) disclosures for retirement plans have been in effect for a few years. It is important to remember that the final regulations reserved a section for welfare plan disclosure. The preamble to the final regulations noted that commenters to the regulations supported disclosures specifically tailored to welfare plans.

Although somewhat dated, the Employee Benefits Security Administration website contains a fact sheet regarding the Department's intent to publish proposed regulations (in March 2011!). The proposed regulations are supposed to improve information provided to plan sponsors to assist them in making informed choices when selecting a service provider.

The FY 2016 Congressional Budget Justification prepared by EBSA provides insights into their agenda. Regulatory projects are Included in the requests for increased staff and funds for enforcement activities. Number one on the list is "amending 408(b)(2) of ERISA to improve fee disclosure for welfare plans".

What information is available on the Form 5500?

Schedule A to the Form 5500 provides the amount of insurance broker commissions but does not provide information about the services that the broker provides. The Schedule A also provides premium information. The amount of detail depends on whether the coverage is experience rated or non-experience rated. Schedule A for non-experience rated coverage provides only the amount of premiums paid. Schedule A for experience rated coverage includes premium paid and may also include administrative fees, risk and retention charges.

As with the myriad of charges related to 401(k) plans, do plan sponsors truly understand what the various fees mean and whether or not the fees are reasonable? Some will argue that insured plans are regulated by State insurance agencies and there is no further need for more disclosure. While that is true, the question remains whether the plan sponsor truly understands the nature of the fees.

Fee information related to self-insured plans paid out of the general assets of the employer cannot be found on a Form 5500. Self-insured plans are on the rise. This trend has caught the DOL's attention.

Take note of a recent court case

A recent court case reported by Todd Leeuwenburgh of Thompson Publishing* may underscore the DOL's position for more disclosure. This article discusses *Dykema Excavators vs Blue Cross and Blue Shield of Michigan (BCBSM).* The Dykema case cites *Hi-Lex Controls, Inc. v Blue Cross Blue Shield of Michigan* as the bell weather case.

Both cases involved self-insured plans with BCBSM as the third party administrator under an ASO arrangement. The cases involved charges of hidden fees among other issues. The charges in question related to a new fee system termed "Retention Reallocation" where BCBSM billed the plan sponsor a higher amount than BCBSM paid to the provider of the service and kept the difference. Other specific fees were also noted in the case.

A key finding of the Hi-Lex case was that BCBSM was a plan fiduciary because it had discretion with respect to plan assets. BCBSM paid itself an additional fee from employee and employer contributions. The act of self-dealing was determined to be a breach of fiduciary responsibility.

The DOL filed an Amicus Brief in support of Hi-Lex. It provides an extensive discussion regarding plan assets. Plan sponsors of self-insured plans should read and discuss with their TPA and brokers.

It is important to keep in mind that not all courts may adopt the same finding as the Sixth Circuit but it is a noteworthy case for both plan sponsors and service providers.

What should plan sponsor do now?

1. Review welfare plan fees with the same scrutiny and diligence as you review 401(k) plan fees. It's a fiduciary responsibility.
2. Ask your ASO vendors pointed questions regarding the existence of plan assets. Keep in mind that if a plan has "plan assets" it is considered a funded plan. Plans with less than 100 participants must file a Form 5500 and plans with 100 or more participants will be subject to an ERISA audit.
3. Keep your eyes open to any new court cases.
4. Know what you are getting into if you decide to self-insure.

Note: all links are active as of the date of issuance of this ErisaALERT.
*Thompson Publishing will provide access to the article until March 2, 2015