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Fiduciary Reminder: Complaint Alleges That Fidelity Charged Improper Fees

The lawsuit alleges that an “infrastructure fee” that Fidelity charges to mutual funds in exchange for inclusion in Fidelity’s stable of investments for retirement plans was not properly disclosed and is prohibited by the Employee Retirement Income Security Act of 1974 (ERISA).

Factual Allegations

According to the complaint made on February 21, 2019, Fidelity required mutual fund companies, affiliates of mutual funds, mutual fund advisors, subadvisors, collective trusts and other investment advisors, instruments or vehicles to make payments to Fidelity in the form of infrastructure payments or so-called relationship-level fees. The complaint alleges that:

Fidelity received these payments in exchange for consideration by Fidelity to be included in the menu of investment fund alternatives made available to Fidelity’s retirement plan clients;

The fees were based on a percentage of assets held under Fidelity’s management and that the infrastructure fees increased the overall expense ratios and other expenses of the investment funds offered to participants, thereby increasing the cost to plan participants;

The infrastructure fees were not disclosed to retirement plans or plan participants;

The infrastructure fees did not relate to any services provided by Fidelity and did not bear a reasonable relationship to the actual cost of services;

Rather, the infrastructure fees were a scheme to recover declining revenue;

Fidelity had an inherent conflict of interest, engaged in prohibited self-dealing, and engaged in prohibited transactions, all of which are prohibited under ERISA.

The complaint also requests that if Fidelity were not found to be a fiduciary or co-fiduciary, then Fidelity nonetheless engaged in impermissible “prohibited transactions” as a service provider to retirement plans, which can also result in ERISA violations.

Fidelity’s Response

Fidelity provided a written response for institutional investors. According to the response, the infrastructure fees are proper and properly disclosed. Fidelity explained that the fees are needed to cover the cost of offering investment funds and provide tools to help investors. Fidelity asserts that the infrastructure fees are not in connection with Fidelity’s services to any retirement plans and such fees are not considered “indirect compensation” under ERISA. Fidelity also claims that participants do not pay the fee directly.

Fidelity declined to comment on whether the Department of Labor is investigating the situation, which has been reported in various media outlets.

What This Means to You

Plan fiduciaries, regardless of whether they use Fidelity as their record keeper, should take the following steps:

Review and analyze investments and fee disclosures for investments (including any footnotes in fine print);

Ask their record keepers whether there are any nondisclosed fees similar to infrastructure fees paid by Fidelity;

Understand and analyze the employer’s/plan sponsor’s/fiduciary’s own fiduciary obligations;

Consider whether additional actions may be appropriate to further the interests of plan participants, including changing the fund line-up or participating in litigation; and

Document the above steps.

This lawsuit serves as a reminder that plan fiduciaries have their own obligations under ERISA and have duties to review, understand, monitor and negotiate fees in connection with services provided to the plan. This includes reviewing service providers’ service agreements and fee disclosures, and

understanding the various fee arrangements so that the fiduciary can determine whether the fees are reasonable for services provided and comparable to other service providers.

Contact Us

If you have any questions regarding this matter, or with regard to fiduciary obligations in general, please contact one of the Employee Benefits & Executive Compensation team members at Husch Blackwell.