

REPORT TO PLAN SPONSORS

June 2007

Litigation About 401(k) Fees

By [Fred Reish](#)

By now, most plan sponsors and advisers are aware of the class action litigation against major American corporations and their providers concerning 401(k) costs and revenue sharing. However, less is known about the specific allegations in those lawsuits. This article quotes selected provisions from one of the complaints. The reference to “defendants” is to the plan sponsor, the committee members and, in some cases, the provider.

“Defendants breached their fiduciary obligations to the Plan . . . by, among other conduct to be proven at trial, one or more of the following acts:

- *Allowing or causing the Plan to pay—directly or indirectly—fees and expenses that were . . . unreasonable . . .;*
- *Failing to inform themselves of, and understand, the various methods by which vendors in the 401(k) industry collect payments and other revenues from 401(k) plans;*
- *Failing to establish, implement, and follow procedures to properly and prudently determine whether the fees and expenses paid by the Plan were reasonable and incurred solely for the benefit of Plan participants; . . .”*

What can plan sponsors and committee members do to avoid being caught up in this type of litigation? They can engage in a prudent process in the selection of their providers and in monitoring those providers and their costs and revenue sharing. Plan sponsors and fiduciaries can make that process much easier if they work with providers and advisers who willingly give them the information needed to perform their fiduciary tasks. Those points are driven home by a report from the ERISA Advisory Council.

“The Advisory Council makes the following recommendations in an effort to further educate plan sponsors and fiduciaries:

- *Plan sponsors should avoid entering into transactions with vendors who refuse to disclose the amount and sources of all fees and compensation received in connection with plan.*
- *Plan sponsors should obtain all information on fees and expenses as well as revenue sharing arrangements with each investment option.*
- *Plan sponsors should also determine the availability of other mutual funds or share classes within a mutual fund with lower revenue sharing arrangements prior to selecting an investment option.*
- *Plan sponsors would require vendors to provide annual written statements with respect to all compensation, both direct and indirect, received by the provider in connection with its services to the plan.*
- *Plan sponsors need to be aware that with asset-based fees, fees can grow just as the size of the asset pool grows, regardless of whether any additional service are*

provided by the vendor, and as a result, asset-based fees should be monitored periodically.

- *Plan sponsors should calculate the total plan costs annually.”*

In a nutshell, the key steps are to:

- Work with advisers and providers to get full information about plan costs and revenue sharing.
- Regularly review and evaluate that information and compare it to competitive costs and the value received by the plan and its participants.
- Reach a reasoned and informed decision and place the appropriate documentation in the plan’s due diligence file.

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